United States Court of Appeals

for the Second Circuit

APPENDIX

74-1168

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F.C.C. 72-957

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", SECTION 73.658(k) OF THE COMMISSION'S RULES PETITIONS OF: NATIONAL BROADCASTING CO., INC. (NBC) MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.) KINGSTIP COMMUNICATIONS, INC. (KHFI-TV, AUSTIN, TEX.) (FOR DELETION OF THE RULE) MCA, INC. (TO PERMIT USE OF "OFF-NETWORK" MATERIAL PLUS 25 PERCENT NEW MATERIAL)	Docket No. 19622 RM-1967, RM-1935, RM-1940, RM-1929

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

(Adopted October 26, 1972; Released October 30, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE CONCURRING AND ISSUING STATEMENTS; COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS.

I. INTRODUCTION AND DISCUSSION

A. Introduction

1. In this proceeding, the Commission seeks information as to the effect and operation of Section 73.658(k) of its Rules—the "prime time access rule"—and invites comments on changes in that regulation which may be appropriate for the future. The categories of information sought, and possible changes, are discussed at some length below. One matter should be clarified at the outset: while "possible changes" include repeal of the rule, the institution of this proceeding does *not* represent a Commission view at this time that the rule should be repealed, now or later. See par. 15, below.

2. Section 73.658(k) was adopted in the Report and Order in Docket 12782, May 1970 (23 FCC 2d 382, 18 R.R. 2d 1825). It was affirmed generally on reconsideration in August 1970 (25 FCC 2d 318, 19 R.R. 2d 1869). In general, it provides that after October 1, 1971, network-affiliated stations in the "top 50 markets" may present, during the four hours of "prime time" each evening, no more than three hours of material from the three national networks, ABC, CBS, and NBC. Effective October 1, 1972, subparagraph (k)(3) of the rule provides that the time thus cleared of network programs (i.e., one hour a night, gen-

erally the hour from 7 to 8 p.m. E.T. and P.T., 6 p.m. C. T. and M. T.) may not be filled with "off-network" material (programs which have appeared on one of the three networks) or feature films which have been shown by a station in the market within the past two years. Thus, in effect, one hour of prime time each night must be devoted to material which is neither network programming nor in one of these other categories.[1] The basic purpose of the adoption of the rule was set forth as follows (23 FCC 2d 395–396, par. 23, 18 R.R. 2d 1844):

> We believe this modest action will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed affiliated) stations. The entire development of UHF should be benefitted . . . It may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming. In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies . . .:

3. Among the matters to be considered herein are the various petitions listed above.[2] We shall describe briefly the petitions and oppositions thereto, and then set forth the Commission's purposes in this proceeding, dealing with the prime time access rule and the "access period."[3]

4. *Another pending petition to limit use of TV "re-runs" generally.* This proceeding does not directly involve the subject-matter of another recently filed petition, that by Mr. Bernard Balmuth and a group called S.T.O.P. (Save Television Original Programming), asking for a general rule limiting use of prime-time repeat material on network-owned or network-affiliated stations to 25% of the broadcast year (RM–1977). This petition, which has drawn substantial support and opposition, will be considered by the Commission in the near future.

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[1] At the same time as the "prime time access rule", the Commission also adopted other restrictions on the three networks, contained in Section 73.658(j), and sometimes called the "syndication" and "financial interest" rules. These sharply restrict the extent to which these organizations may engage in the non-network distribution of TV programs, or "syndication", or acquire interests in TV programs other than the right to network exhibition. These rules are not directly involved in the present proceeding. The "prime time access rule" applies by its terms only to the top 50 markets. However, the networks decided that, as a matter of business judgment, they could not continue to present more than three hours of prime-time programs for the rest of the country if barred from access to their affiliated stations in the top 50 markets for more than that amount of prime time. Therefore, network prime-time schedules have been cut back to 3 hours a night across the board, generally a half-hour less than had previously been programmed by them.

[2] Three of the petitions seek, in effect, repeal of the rule—those of NBC and the two individual stations listed, both UHF stations in comparatively small "intermixed" markets. These three petitions have been supported by some individual station licensees (not all of them identified); the NBC petition has been opposed by Westinghouse Broadcasting Company, Inc. (Westinghouse, a large station owner and supplier of non-network program material, and long one of the chief proponents of the rule) and by American Broadcasting Companies, Inc. (ABC) insofar as NBC seeks rule-making looking toward early repeal of the rule. Hughes Sports Network also opposed the two UHF petitions.

[3] The term "access period" is used herein to refer to the portion of prime time which is generally cleared of network programs in the top 50 markets, as the rule operates. For the 1971–72 season, this has included all nights from 7 to 7:30 p.m. E.T. and P.T. (6–6:30 p.m. C.T.); 7:30–8 p.m. E.T. (6:30–7 p.m. C.T.) except for all networks' affiliates on Tuesday nights and CBS and NBC affiliates on Sunday nights; and 10:30–11 p.m. E.T. (9:30–10 p.m. C.T.) for CBS and NBC affiliates on Tuesday, ABC affiliates on Wednesdays, NBC stations on Fridays, and CBS affiliates on Sundays. There are a number of exceptions to this general pattern.

For 1972–73, the "access period" will be more uniform as far as nights of the week are concerned, being 7–8 p.m. E.T. and P.T. (6–7 p.m. C.T.) on all nights for ABC stations and all but Sundays on CBS and NBC; and, on Sundays, 7–7:30 p.m. and 10:30–11 p.m. for CBS and NBC affiliates.

It is not to be considered in the present proceeding, as such, but the two are clearly related to a degree; for example, the feasibility of developing and producing a given non-network series could vary depending on whether the supplier must furnish 39 individual programs (75% of 52 weeks) or may get by with as few as 26 (50%) or perhaps even less. We merely call attention here to the pendency of this petition, and to the fact that it may be appropriate to give this subject consideration in rulemaking. Parties may wish to prepare their comments herein with this in mind.

B. The Petitions for Rule Making

5. As mentioned, three of the above-captioned petitions for rulemaking—those of NBC and two UHF stations in comparatively small "intermixed" markets—seek repeal of the rule, the two individual petitions both apparently asking it for this coming year, 1972–73, and NBC envisioning it in time for the 1973–74 season. NBC asks the Commission to initiate forthwith a Notice of Proposed Rule Making broad enough to include rescission of the rule, to develop on an expedited basis the facts as to how the rule is operating, and to convene a conference among members of the staff and all interested parties, to devise methods to obtain this material promptly and completely. NBC's argument relates largely to the asserted decline in the television audience in the 7:30–8 p.m. (E.T.) period, compared to what it has been when network programs were presented then, assertedly 7% in the top 50 markets and 6% elsewhere, compared to no change or some increase for the remainder of prime time (and also an increase for Tuesdays, when the networks have begun their programming at 7:30 following the waiver to ABC).[4] While NBC recognizes that part of the audience change has been a shift to independent stations from network affiliates, it asserts that, as the above figures show:

> . . . the preference for network programming is so strong that millions of viewers would rather not watch television at all than watch nonnetwork programming.

Therefore, it is claimed, as shown by the other two petitions, stations are adversely affected, particularly those in small markets which always have had narrower margins. NBC also claims that the rule has not been and will not yield benefits in terms of an expanded production of quality first-run material, or of increased diversity of programming. It is claimed that there are very few new producers, and that many, and the most successful, "first-run" programs are those which are continuations or revivals of network prime-time or daytime material (*Hee Haw*, *Lawrence Welk*, *Wild Kingdom*, *Let's Make a Deal*, *To Tell the Truth*, *Truth or Consequences*, *What's My Line* and *Juvenile Jury* are cited as examples). A study by an advertising agency of November 1971 non-network programming (7:30–8 p.m. E.T.) is cited, giving for the top 10 programs in audience two off-network

[4] Other sources discussing this subject, including Westinghouse Broadcasting Co. in opposing the petition, claim lesser audience-loss figures, such as 4% or 2% overall for the 7:30–8 p.m. period. It appears unquestionable that, in markets where there are independent stations as well as network affiliates, there has been a shift in viewing during this period away from the affiliates to the independents.

series, five continuations of network series, two revivals, and only one entirely new series (Primus), with only one of them reaching an audience as large as the tenth-rated 7:30–8 p.m. network program of the previous year, *High Chaparral*.

6. Westinghouse Broadcasting Company, Inc. (Westinghouse), which is both a large multiple TV and radio owner and an extensive supplier of syndicated material, vigorously opposes the NBC petition, as premature and unsupported. It is urged that as far as gathering information is concerned, a new proceeding is unnecessary; Docket 12782, which was not closed out, can be re-opened for this purpose; and that adoption of the proposal will have a most discouraging effect on the development of non-network material, and in fact will "make a mockery" of the full and fair test which the rule is supposed to have this coming year, adding to the uncertainty which already unfortunately prevails and which has a depressing effect on the program-production activity. Westinghouse asserts that despite NBC's criticism of the course of non-network program development, it lists 32 *new* first-run series, of which several are properly regarded as truly innovative (cited are Westinghouse's *Doctor in the House*, *David Frost Revue* and *Norman Corwin Presents*, *Primus* from Metromedia, and *Story Theatre* and *Rollin' on the River* from Winters-Rosen). Westinghouse claims that this is a good record, particularly in view of the adverse circumstances which prevailed (the uncertainty as to the rule itself until it was affirmed on appeal in May 1971, which gave producers little time before the fall season, and the exemption to permit use of "off-network" material) and the industry's traditional preference for proven and successful program ideas. ABC's arguments in opposition to a rule-making (though not to the gathering of information) are much the same as those of Westinghouse: it is said that development of a viable first-run syndicated programming market may well require innovation, and that "innovation typically follows from experimentation; and experimentation requires time." In short, it will be serveral years before a really sound judgment can be reached as to the success of the rule, or lack of it; and that meanwhile the Commission can best maximize the chances for success by going on record to the effect that the Rule will be given a reasonable opportunity—not "one year of full effectiveness under the 'gun' of a repeal proceeding." [5]

7. In reply, NBC added somewhat to some of its earlier arguments. It stated that 1972–73 is as good a "test" year as any, and that the pendency of a rule-making proceeding can have no adverse effect on the results of such a test, since the programming which is available will already have been planned and largely produced, before the fall season begins.

8. The petitions by the two UHF stations mentioned, essentially similar to each other, emphasize the "economic injury" argument urged

[5] ABC asserts that the lower audience mentioned by NBC may reflect largely the presentation of "off-network" material during the access period—naturally, people prefer present network programming to former network programming.
Hughes Sports Network, opposing the two UHF petitions although not that of NBC, briefly urged some of the same arguments as Westinghouse and ABC, including the assertedly "premature" nature of any proceeding at this time.

by NBC, particularly with respect to their own situations as UHF stations in intermixed markets, at a competitive disadvantage vis-a-vis the VHF stations in the same markets (two in Springfield, Mo., one in Austin, Texas). They claim that they are able to survive as long as they have the exclusive right to present a full line-up of one of the three networks in their areas; but with the "access rule" cutback, they are seriously injured, through loss of the network revenues which they formerly received for the time involved and through having to pay the costs of programming the time themselves. It is said that, with the lower audience which is obtainable for the non-network material (particularly with the greater problems in tuning UHF to begin with), the small revenues they obtain from selling the time on a non-network basis do not begin to compensate for these increased costs. The point is also made that, with non-network material being extremely costly, they cannot compete for desirable "access time" programs with their VHF competitors. Hughes Sports Network opposed these filings.

9. *The MCA, Inc. petition.* The petition of MCA, Inc. (RM-1929) looked toward the adoption of rules (in time for the 1972–73 season) under which material would comply with the "off-network" restrictions of the rule if it consisted of "off-network" material plus about 25% new material (4 programs out of 13, 7 out of 26, etc.). MCA urged this as a measure to permit more production of new non-network material of quality, by eliminating some of the tremendous costs and risks involved in an entire new series. It was claimed that this would mean more good-quality material, at lower cost and thus more easily available to stations, particularly those in small markets and UHF stations in intermixed markets, which often have limited resources. MCA has long been a vigorous opponent of the rule, and expressed here its doubts as to its merits; but it stated that this is one small step which the Commission can, and should, take quickly to ease part of the problem. The Commission denied this petition in April 1972 (*Petition of MCA, Inc.*, 34 FCC 2d 825, 24 R.R. 2d 1771).[6] The chief basis of decision was that the petition—*which sought a change in time for the 1972–73* year—was premature.

C. *The reasons for this proceeding and the Commission's views on it.*

10. There is clearly a need for a proceeding dealing with the prime time access rule. First, there is the need to gather information about how the rule is working, both as compared to no rule and as compared to how it would work with various changes discussed herein. As to the propriety of gathering such information at this time, there appears little room for argument, and, indeed, no party really contests this. This Commission has some degree of obligation to conduct a continuing examination into the effect of any of its rules; and this is particularly true where, as here, the rule represents a breakthrough into a new area of regulation, previously not subject to rules or restrictions. It is

[6] In its present rule-making petition, NBC mentions the MCA petition and asserts that, if the Commission is going to give consideration to this type of change in the rule, it might well give consideration also to letting new network material back into the cleared time, rather than older "off-network" programming.

especially true here because of the degree of controversy which surrounded the rule both before and since its adoption. Also, we expressed in our decision in Docket 12782 the belief that the rule should and would be examined from time to time, to see what changes, if any, should be made in it. Therefore some gathering of information is clearly in order. This could be done in Docket 12782; but that proceeding is over 10 years old and a great volume of material has been accumulated in it. We believe it preferable, from the standpoint of reaching prompt decisions herein, to call for the submission of the new, current material in a new proceeding. However, Docket 12782 has not been closed out, and the material therein is rather readily available; we will accept comments referring to it just as if the material were re-submitted herein.

11. Also, as far as the information-gathering may be "premature", we recognize that information for the 1972–73 year, which is what basically will be involved here, may not be as favorable to the rule as that for some later period, when more of the necessary adjustments and developments involved have occurred. However, we believe that, if allowance is made for further developments, as commenting parties are urged to outline in as much detail as is now possible, a fairly accurate idea of the rule's prospects can be obtained at this point. We will make such allowances in reaching any decision herein.

12. There is a second clear basis for this proceeding: the apparent need for certain changes in the rule if it is to operate in the public interest to the maximum extent. These include some of a more or less mechanical nature, to ease the burden on affected parties and the Commission, and others of a more substantial nature. The need for changes, as outlined herein, does not need much elaboration. The rule in its application and administration has given rise to a very large number of waiver requests, which have been a burden to the parties involved and to us. It is, obviously, highly desirable to eliminate the need for many of these, by adopting general rules which more nearly fit the range of situations which are involved. The sports area is one example of situations where a general rule would appear feasible and much preferable to present practice. Probably of more basic significance are areas such as the "off-network" situations, where it is questionable whether the rule if literally applied would serve the public interest, and where, at the same time, any deviation from it on an *ad hoc* basis appears to give problems. Moreover, apart from the specific problems in various areas which have arisen, there is a more general consideration. No "new rule", such as this one, can be expected to be 100% sound and correct when it is first adopted. After a year's experience under it, it is appropriate to see how it is working and make those changes which appear appropriate.

13. Thus, in view of the above considerations, an over-all proceeding is warranted at this time. We have decided to include in that proceeding the question of whether the rule should be retained or rescinded. Three of the petitions before us, listed above, have raised this question, and in our view these can best be disposed of in the context of this proceeding, and particularly in light of the information gleaned through

it. In any overview such as this, we should have flexibility to take any and all actions which the record may show to be in the public interest. Moreover, we see no adverse consequence from proceeding in this fashion. The programming for the 1972–73 season will not be affected because, as NBC points out, it is already "set", or virtually so. As to the effect on the future, particularly the 1973–74 season, the short answer is that we plan to gather the data and dispose of the basic issues raised by the petitions on a prompt basis—in early 1973, and before there can be too much of an untoward effect on the 1973–74 season.

14. Indeed, from the point of view of the proponents of the rule, this approach should be advantageous, because—if the review is favorable to the rule—it will remove any cloud over it, not only for the next year but quite likely for several years to come. To put it otherwise, there must be an overview, in light of the nature of the rule and need for at least some changes in it, and, that being so, it is better to effect the overview at this point and "get this matter behind us." As to the timing of this examination, the "off-network" and "feature film" provisions of Section 73.658(k)(3) will now be in effect, and we should be able to get a good indication of the rule's prospects. As stated, we will make due allowance for the fact that the rule is still fairly new, so that perhaps it has not yet reached its full potential. Parties are urged to comment, in as much specific detail as possible, on what significance should be attached to the fact that the rule is still rather new, and any related uncertainties.

15. We make one final point—although it should be unnecessary. The Commission has *not* adopted any decision or view, even of a tentative nature, as to the desirability of rescinding the rule. It would be wholly wrong for us to do so, when the 1972–73 year is just getting under way and there is no data before us as to the efficacy of the rule under full conditions, i.e., with Section 73.658(k)(3) in effect. Indeed, we stress that the presumption is the other way: the Commission has a rule which is now going into full effect, and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest, particularly in light of the purposes set forth in paragraph 2, above. This proceeding gives interested parties an opportunity to make showings on this critical issue, and thus facilitate an informed Commission decision. In light of the petitions and other circumstances, nothing less would be appropriate, but nothing more is to be inferred from what is simply a sound and fair way to proceed to the disposition of significant pending petitions.

II. SPECIFIC INFORMATION REQUESTED AND SUBJECTS INVOLVED

A. Information Sought

16. As mentioned, one of the most important purposes of this proceeding is to gather information about the operation of the prime time access rule, both in relation to the changes proposed herein (including rescission of the rule), and generally for the Commission's guidance as to the future. What is sought is information as to *effect*

and impact—from the operation of the rule as compared to operation without it, and from the various modifications considered herein (and past waiver actions) as compared to operation under the rule as now in effect. The effect on future development is also highly important. The specific points covered below are all subsidiary to that general objective. The information sought falls into two general areas: *programming* information and *economic* information, the latter involving three aspects—the impact on stations, the economics of program production and distribution, and the effect on the program production business. In both areas, the Commission expects to rely partly on data other than that submitted in comments, as discussed below; but unquestionably commenting parties can be of considerable assistance if their information is specific and complete.

17. *Programming data.* With respect to programming, the Commission intends to rely partly on data contained in *TV Guide* for the various parts of the country, and also American Research Bureau (ARB) audience survey material, which lists the programs presented by stations covered (e.g., May 1972). However, this data is not always completely informative as to the nature of the program; we hope that as many TV station licensees as possible will present information in this area (including the networks, both as networks and as station licensees). As mentioned, the primary objective is to obtain information as to the *effect and impact* of the rule or possible changes in it (or waivers of it).[7] The specific information sought is as follows:

(a) The programs that the station has been presenting in the "access periods" during 1971–72, will present in 1972–73, and will present further in the future as far as it can be projected: (1) under the rule basically as it now stands; (2) if there were no "prime time access rule";[8] (3) with various changes in the rule, including adoption of a "21 hours a week" standard, possible relaxation to permit some use of "off-network" material as part of regular program series or for individual programs or short series, and others mentioned herein. We hope licensees will submit enough information to give an idea of the nature of the program as well as its title, in particular (except for network programs and the better-known syndicated programs) whether it is locally originated or syndicated, and the program type. The three networks are expected to indicate, as best they can at this point, what programs they would be presenting as network material in 1972–73 and later years, during the "access periods", if this time were available to them.

(b) What has been and would be the effect, in terms of the presentation of and demand for new syndicated or local programming (and on the incentive to produce such material) of one or more of the following:

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[7] While this investigation relates largely to "top 50 markets" network-affiliated stations, other stations are invited to comment, since the rule in practice has had an effect "across the board."

[8] If there is no other information indicating what would be the station's practice in the absence of the rule, it may show its programming for the 1970–71 season, the last before the rule became effective.

(1) grant of waiver to stations in the top 50 markets to carry network news at the beginning of prime time without having it count toward the permissible three hours, if preceded by a full hour of local news.

(2) grant of waiver to the networks to present one-time news and public affairs programs without counting in the permissible three hours; on a more general exemption for programming of these types.[9]

(3) Change to a "21 hours a week" standard instead of three hours a night, either completely or partly, such as allowing a small amount of occasional deviation to "make up" network programs lost through preemption, or to clear a one-hour segment between news and network programs, or permitting flexibility within the 21-hour framework provided at least a half-hour of non-network material is presented each night.

(4) permitting generally (or refusing to permit) sports "runover" waivers, for example games in the late afternoon running, somewhat past 7 p.m. E.T.; or permitting presentation without limit of a small number of important events such as the Olympic games.[10]

(5) Changes in Section 73.658(k)(3), including: (1) relaxing the "off-network" restrictions with respect to individual "special" programs or short series, or generally permitting as much as 25% of a series to be old material, or a considerably higher percentage such as urged by MCA, Inc. in RM-1929; and changes in the "feature film" provisions as mentioned in paragraph 41, below.[11]

(6) Providing that, as far as the Mountain and Pacific time zones are concerned, a program schedule will meet the rule if it complies with the three hour restriction in the Eastern and Central time zones.

(c) What non-network programming (syndicated or local), intended for carriage during the "access periods", will be available to stations during the 1972–73 season? We hope that program producers and syndicators, and station licensees as to local material, will give full and reasonably specific information in this respect.

(d) To the extent the basic concept of the rule—limitation to three hours of prime-time network programming, and thus promotion of independent program sources—is not working in optimum fashion to further the public interest, how would the situation be either improved or worsened by substantial liberalization of the "off-network" restrictions, for example, as urged by MCA, Inc., in RM-1929?

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[9] This question is regarded as particularly important because the availability of such material is an essential ingredient of broadcasting in the public interest, and at the same time diversity of viewpoints is also highly significant. Commenting parties are asked to indicate how much such material is available from non-network sources, or is likely to be in the future, and how this would be affected by our action here.

[10] We are particularly interested in what effect an occasional "runover", to the extent of 10 minutes or so, actually has on what the station presents in the following hour—whether it presents the same non-network programs it would have otherwise but simply "clips" them, or whether it substitutes other material, and if so what.

[11] See paragraph 48 below, concerning four recent decisions in the "off-network" area as to which parties may wish to comment.

18. *Possible criteria for evaluating program "diversity" and similar matters.* One of the primary purposes of the rule was to promote *diversity* of program sources and ideas (see paragraph 2, above). We therefore seek information on this subject, particularly how the rule works in practice in this respect. In addition to its general meaning—the extent to which material is different from other material presented in the market currently or in the recent past—this concept could have a number of different particular aspects:

(a) programming which is of a different *type* from most other programming fare, for example, the factual-fictional distinction made in the *Wild Kingdom* and *Lassie* decisions;

(b) the number of times, if any, that the exact same program has been presented in the market, at least in recent years, for example only once earlier on the network as opposed to two or more times;

(c) the length of time since its last presentation, for example, the "two years" test for feature films; and

(d) the extent to which the material, while never itself shown before, is simply a continuation of a series which has already run in the market (on a network or non-network basis) to the extent of hundreds of generally similar episodes. There are doubtless other specific aspects.

19. Another related but much more difficult matter is being advanced—that of "program quality". For instance, MCA Inc. in its petition asserts that the non-network material being presented in the access period is "of shoddy and inferior quality."[12] The Commission has traditionally, and wisely, eschewed the role of being a judge of the "quality" of programming. We therefore have great difficulty in evaluating this aspect of the present matter. Interested parties are of course free to submit—and if they treat this subject at all, we hope that they will submit—showings making *objective* points in this regard. We ourselves have not formulated any objective standards for making "quality" judgments, and do not now perceive the basis for doing so. Thus, factors such as ratings, comparative production costs, and critical favor (or lack of it), while obviously relevant to the issue, have never been regarded as reliably and objectively determinative of the issue of "quality" or what is "superior" or "inferior" program material. As indicated, parties advancing arguments along these lines are urged to do so on some kind of *objective* basis.

20. *Economic data: effect on stations.*[13] As indicated above, one of the chief lines of argument against the rule is the asserted adverse economic effects on stations, perhaps particularly small-market stations and UHF stations (e.g., the two petitioners mentioned here, in intermixed markets). Initially, we stress that "economic injury" considerations are pertinent only where they have consequences signifi-

[12] Obviously, what is generally involved here is *comparative* quality, non-network "access period" material vis-a-vis the network material which would be shown then in the absence of the rule. This raises the question of what network programming should be used as a basis of comparison (for example, a good deal of it does not last as long as one season).

[13] The stations referred to here are not only, or even primarily, the stations in the top 50 markets which are literally covered by the rule. With the cutback in network schedules across the board, stations in other markets are affected also.

cantly impairing licensees' ability to operate in the public interest. The Act does not guarantee any level of profitability.

21. There are certain problems inherent in attempting to get this type of information in public comments. First, to be of probative value, either economic data concerning impact on stations must include data for *all* stations—the "universe"—or it must include data from a representative and scientifically valid sample of that universe. There is no assurance that comments in themselves will provide either of these. Second, there is sometimes, and might be here, an understandable reluctance on the part of the licensees to "bleed in public", even if substantially impacted economically. Therefore, it is necessary to take steps to assure that the material in this area on which decision is reached is complete and valid, even if it means going beyond what is publicly filed. Also, of course, it is desirable to set forth certain guidelines with respect to material which is filed publicly, to make sure that it is complete and probative.[14]

22. The following provisions indicate what is expected of parties filing herein concerning the economic impact of the rule on their stations, and what may be required in addition to the comment material:

> (a) Comments by licensees claiming adverse economic impact on their stations, if they wish to have their claims given serious consideration, must make a complete showing therein as to the "access periods", i.e., those periods when they presented non-network programs but would have presented network material if the networks had continued their 1970–71 prime time pattern: This shall include exact data as to revenues from network programming and non-network programs, and the costs of the latter (including outright costs, and transportation or other charges, if any), for the 9-month period from October 1, 1971 through June 30, 1972. If effect on the value of "adjacencies" is claimed, this must be accompanied by data as to how much was so received in 1970–71, and how much was in fact received, for the same 9-month period.
>
> (b) Parties filing comments raising "economic injury" arguments need not necessarily show in their comments the complete picture as to the station's revenues, expenses, and profit or loss;

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[14] An example of the type of problem which may arise in this connection is the petition by the Springfield, Mo. UHF licensee (RM–1935). This party set forth figures as to what it has lost in network compensation through the cutback ($112.50 weekly); and the costs for the non-network programming it has to buy instead ($172.50 in expenditures, plus $55 freight charge, plus $300 in commercial positions given for "barter" programs). On this basis, it estimated that the rule was costing it $640 a week, or over $33,000 a year. However, it did not state what revenue it receives from the sale of its non-network time during the access period, simply asserting that it has had a 26% audience loss for the 6:30–7 p.m. (C.T.) period, and that its revenues from the sale of this time on a non-network basis did not amount to recovery of the increased costs. Obviously, the material in the petition does not give a complete picture. This material was supplemented by petitioner and counsel after a Commission staff inquiry.

In general, commercial time given in "barter" programs is not properly includable as a cost item in this analysis, since it is reflected in the reduced revenue received for a non-network program when only part of the commercial time in it is available to the station to sell. However, stations may make a showing in this respect if they wish, since, if a susbtantial amount of the commercial time in a program must often be given to the program supplier, it represents an inherent limitation on the return which the station can expect from the program.

but they must be prepared to file immediately after their comments, if it is requested, an FCC Form 324 giving this data for the 9-month period mentioned above. This will be handled subject to the usual provisions as to confidentiality governing Forms 324.

(c) At some point, it may be necessary to inquire of all commercial television licensees, or at least all of those which are network affiliates in markets having at least three stations, as to data concerning the financial effect of the rule on them. This inquiry, which would require clearance by the Office of Management and Budget, is not being instituted at this time, but may later be instituted this year if it appears necessary on the basis of the comments filed.

23. *Economic data: the economics of program production and distribution.* One of the most common lines of argument against the rule is that, with networking being a very efficient mechanism and much the cheapest way of distributing programming and supplying advertising support for it, any alternative method of program supply entails more money for distribution and less for production, and, therefore, lower quality, particularly because of the very high and increasing costs of such production. Related is the argument that, with these high costs and with the risks involved in the non-acceptance of programs by the public and station customers, the networks are among the very few parties who can afford the risks involved in production of good-quality material. These arguments were, of course, considered at length in the Docket 12782 proceeding which led to adoption and affirmance of the rule. We have no intention of instituting a new or long and exhaustive re-exploration of the subject. On the other hand, we would certainly welcome and take into account new data in this area, if offered within the time frame of this proceeding as indicated below.

24. We seek data on subjects like the following:

(a) What actually is the cost of producing "good-quality" programming, both network and non-network (syndicated or local) either per episode or total? (Figures in the previous record in Docket 12782 have contained a rather wide variety of figures).

(b) To what extent is program quality related to production costs, and, specifically, how (higher salaries for better people, more processing and therefore more technicians, etc.).

(c) What are the comparative costs of distribution of network programming and non-network syndicated material, and, with the latter, of securing advertising support for it?

(d) To what extent is it realistic to assume that there is a fixed sum of money available for the whole program-supply process, so that if more goes into distribution, less is available for production?

(e) To what extent do the higher costs and risks involved in non-network production and distribution (if they are higher) mean that prime time programming is going to be of a type cheaper to produce, such as so-called "game shows", rather than the material which has previously characterized prime time?

25. *Economic data: effect on the program production industry and employment therein.* As indicated in paragraph 2, above, a main purpose of the rule was to provide a healthy production industry, able to supply independent programming. One of the arguments against the rule is the assertedly depressing effect on the U.S. program-production

industry. While the factual basis of such arguments is not always completely clear, it appears to consist chiefly of two actual or potential lines of development: (1) the substantial extent to which, to keep costs down, "access period" non-network material consists of material originating, or at least produced, outside the U.S.; and (2) the extent to which access-period non-network material is of a sort sometimes called "game shows"—relatively inexpensive material similar to (often a continuation of) programs which have appeared on daytime television—rather than the sort of material which is characteristic of network prime time television. Comments on this subject are invited.

B. *Specific proposals on which comments are invited.*

26. In the following paragraphs, comments are invited on specific proposals; under each topic, the proposals are set forth first, followed by a brief discussion of the pertinent considerations. Usually, they are on a "one or more" basis, i.e., one, or more than one, of the suggestions might be adopted if it appears in the public interest.

27. Initially, one point should be stressed. Putting forth a proposal for comment herein does not mean that the Commission necessarily has a view, even tentatively, that it should be adopted. It simply indicates our view that the proposal should be considered in light of the comments and data received in the proceeding. Further, on some of the matters, study may indicate the need for further, perhaps more specific, proposals; this is one reason why this is a "Notice of Inquiry". However, we have given notice herein of the "subjects and matters at issue", and therefore all interested parties are specifically advised that the Commission has the flexibility and discretion to adopt rule changes in the following areas if it finds that the public interest would be served thereby (with the exceptions footnoted below).[15]

28. *Effective dates of changes.* If rule changes are adopted, there is then the question of when they should be made effective, for example: (1) the usual 30 days or so after publication in the Federal Register, or (2) for the next season, starting October 1, 1973, or perhaps even thereafter. As to some minor changes, the first approach might well be appropriate; it appears obvious that major changes, or rescission, could not well be adopted before the next season (these would probably include matters such as a flat "21 hours a week" standard and modification of the "off-network" restrictions to or approaching the extent urged by MCA, Inc.). Comments on the appropriate dates of changes are invited.

29. *Changes in the direction of a total or partial "21 hours a week" standard.* Comments are invited on the question of adopting one or more of the first three following proposals, or, in the alternative, adopting the fourth proposal listed, going to a flat "21 hours a week" standard.

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[15] The foregoing discussion applies to the proposals set forth in this subsection B, which are, for the most part, in the direction of relaxations of the rule. As to other matters set forth below in subsection C, extensions of the rule in various respects or "exemptions" for certain types of programs other than news and public affairs, this is an Inquiry proceeding only. See also par. 49 in this subsection B.

(a) Leaving the basic three-hour-per night formulation, but providing that stations may exceed that amount on one or two nights a month to the extent of a half-hour or an hour, provided they reduce network prime-time material a corresponding amount within the next 14 days.

(b) Leaving the basic three-hour restriction, but providing that stations may deviate from it (following notification to the Commission) where they regularly present some news at the beginning of prime time and desire to clear a following one-hour segment regularly for an hour-long local or syndicated program, and the only way they can do this and continue to carry desired network material is to exceed the 3-hour limit on another night,[16] (see *Hubbard Broadcasting, Inc.* (KSTP–TV), 32 FCC 594 (October 1971). The "21 hours a week" standard would apply in these cases.

(c) Providing that stations may adhere to a "21 hours a week" standard, but must continue to present at least a half-hour during prime time each night of material which is not network, off-network nor recently shown feature film.

(d) A flat "21 hours a week" standard. If this is to be adopted at all, it will not be before October 1, 1973.

30. The "21 hours a week" argument was one raised by several stations in waiver requests in 1971, in support of requests for waiver to exceed the permissible three hours on one night a week, accompanied by a reduction on another night. In general, this was rejected, although it was one of the considerations in grant of waiver in the *Hubbard Broadcasting* case cited. We similarly rejected the concept, for the future, in denying ABC's request for continuation of its waiver for Tuesday nights (*American Broadcasting Companies, Inc.*, 33 FCC 2d 1038, March 1972). The reasons have been a belief that time should be available to non-network program sources on a *regular* basis, the same period each night or at least not varying from week to week, in order to encourage the development of such material, for example programming suitable for "stripping" in early prime time. Also, there was some thought that stations might simply fulfill their obligations under such a relaxed restriction on one "junk night", presenting all of their non-network material then and programming the remaining evenings with 3½ hours or more of network material.

31. Nevertheless, there appear to be some considerations supporting this type of relaxation. First, it would increase licensee flexibility: as noted in the *Hubbard* decision, this appears to be the only way stations can clear time for a one-hour non-network program if they carry news after the beginning of prime time, and continue to carry desired network material. Also, it could be that adherence to a strict three-hour standard tends to discourage occasional preemptions of network programs for desirable local material, if the station is faced with the complete loss of the network program and perhaps even carriage of it by a competing station in the market (whereas, under a "21 hours a week" standard, the station could "make up" the program preempted on another evening).[17] These are the thoughts behind the first two proposals above. Another consideration is that it might not be a bad thing

[16] This is probably more of a problem in the Central and Mountain zones, where prime time begins at 6 p.m. rather than 7, than elsewhere. According to ARB February–March 1972 audience survey data, about two-thirds of the "top 50 market" stations in those zones carry news in the early part of prime time, compared to only about one-third in the rest of the U.S.

[17] This has come up largely in connection with local sports events, such as basketball, in which cases the station is probably going to go for the preemption, whether it can "make up" the network program later or must forego it entirely. However, there could be desirable local material for which the choice would not be so clear.

for some of the cleared "access periods" to be later in the evening, since somewhat different types of programming might thus be presented and encouraged (see paragraph 57, below). Parties supporting relaxation along one or more of the lines indicated should give specific examples of situations where the present restriction is undesirable, if there are any; parties opposing such relaxation should indicate specifically why it is important to have time available on a *regular* basis.[18] Another pertinent question in this connection is whether, whatever may be decided as to individual stations, the networks themselves should be permitted any deviation from a three-hour standard.

32. *Other changes in computation of prime time network programming.* Comments are invited on the adoption of one or both of two other changes in the method of determining the amount of permissible prime-time programming. The first change set forth below is designed to resolve automatically the situation prevailing in a few markets not observing daylight-saving time (presently Detroit, Grand Rapids, Indianapolis and Phoenix) during the portion of the year (late April to late October) when it is observed in the U.S. generally. This change is believed self-explanatory. The two changes are as follows:

(a) Providing that, automatically as a matter of rule, in the case of "top 50" markets which do not observe daylight-saving time, during the "daylight-saving time" part of the year (late April to late October) prime time will be moved back one hour, e.g., to 6–10 p.m. E.T. instead of 7–11 E.T., for these stations, corresponding to the local time at which network material is actually received in these places.

(b) Providing that, with respect to prime time network programming (or possibly other evening material also) any arrangement which complies with the rule in the Eastern and Central time zones will also be acceptable for stations in the Mountain time zone, and possibly also the Pacific time zone.

33. The second change above is based on a suggestion by NBC in the recent proceeding (Docket 19475) in which we changed the "prime time" programming for the Mountain time zone to 6–10 p.m. M.T. NBC's suggestion was that stations in the top 50 markets in the Mountain zone be permitted to carry more than three hours of prime-time network material if the schedule of such programs in the Eastern, Central and Pacific zone meets the standards of the rule, so that the excess occurs only in the Mountain zone. This was adopted only in part in the Report and Order in Docket 19475 (24 R.R. 2d 1972, FCC 72–578, 37 F.R. 13622), with respect to situations where the network material that evening is live and simultaneous, such as a sports event, and where the station in the Mountain zone broadcasts no other network material during prime time (including "pre-game shows") the same evening. The Phoenix NBC affiliate, supported by NBC, has recently sought reconsideration of our refusal to adopt the entire NBC proposal.

34. While the change in "prime hours" to 6–10 p.m. M.T. will eliminate many of the problems which have arisen this past year (such as sports or movie "runovers" which occur after 11 p.m. E.T.), and

[18] One problem with adopting a flat "21 hours a week" standard is that there are a number of stations which regularly present less network prime-time material than that, most often where they peempt a network movie, or other network material on one evening, to present their own local movie. If these stations were permitted to apply this non-carriage to the whole week, it could result in their keeping very little time open for new non-network material. Comments on this type of situation are invited.

others will be taken care of by the NBC proposal as adopted, it may be that further extension along these lines will be appropriate. Comments are invited on whether the Note to Section 73.658(k) adopted recently should be extended to include complete sports events where there has been a "pre-game show", or "runovers" of events which are not live, simultaneous material, such as movies. Comments are also invited on whether this principle should also extend to additional programming presented by networks on the same evening in the East before the particular event but which Mountain zone stations wish to present after the event.[19] Comments are also invited on whether the same principle should be extended to the top 50 markets in the Pacific zone, not so much in connection with "runovers" (which are not a problem since the sports event occurs quite early) but for network programming presented before the game in the East but which these stations may wish to present after the game in the West (or material programmed especially for the West).[20] The Commission does not have any views at this time as to whether changes along these lines should be adopted: we have recognized before the problems which stations in these time zones face in integrating "simultaneous" material into the usual pattern of delayed broadcasting which prevails there. One important consideration, here and elsewhere, is *to what extent relaxation along these lines actually will impinge on the availability of prime time on these stations to non-network sources.* Comments on this point are solicited. These are examples of changes that will be made at an early date if it appears that the public interest will be served thereby.

35. *Rules designed to deal with sports event situations.* One of the most common subject of waiver requests, and Commission consideration of them, has been in connection with sports events. The following rules are proposed to deal with these situations for the future: the first three below are alternatives, and the fourth, involving a somewhat different concept, is a separate matter which may be adopted with or without one of the others.

(a) With respect to "runovers" into prime time of late-afternoon events (and possibly also some events scheduled for prime time) putting the burden of accommodating the "runover" on the networks and stations in the carriage of network programming, by providing that if a late-afternoon event runs over into prime time (i.e., after 7 p.m. E.T., or 6 p.m. C.T.), network evening programs must simply start that much later, so as to leave a full hour for non-network material at the beginning of prime time (e.g., if the event runs until 7:10, the network's evening material could not start until 8:10).[21]

(b) Providing by rule that it is assumed that sports events will last no more than a certain time, and ignoring runovers beyond that time. (Comments are invited on what are appropriate time allotments for various types of events; it presently appears that 3 hours for

[19] See *KOOL–TV* (Phoenix, Arizona), FCC 72–735 (August 16, 1972).

[20] See *Academy Award and Miss America programs*, 33 FCC 2d 743, 23 R.R. 2d 987 (February 1972); and the waiver granted NBC affiliates on August 29, 1972 (FCC 72–782).

[21] This type of scheduling, while unusual, is certainly not unknown, for example following Presidential messages early in prime time. It may be that this is the simplest way of dealing with the matter, particularly if the incidence of sports event "overruns" is as small as the networks say it is.

baseball and football, and 2¼ hours for basketball, should be sufficient, at least in the absence of a "pre-game show" or post-game material.) Comments are also invited on the matter of pre-game shows and post-game shows generally; to what should any assumed fixed period for sports telecasts permit these? We are presently of the view that it should be only in connection with games of unusual importance—playoffs or championship games—and not regular season contests, and not for more than 15 minutes (see our action of August 29, 1972, FCC 72-782, 25 R.R. 2d 228, granting waiver to NBC affiliates).

(c) Providing that if an event runs more than a few minutes over the allotted period—say more than 5 minutes, or more than 10 minutes—the network or its affiliate will have to "give back" a half-hour of time on some evening during the following few days.

(d) Designating by rule a certain number of unusually important sports events, which, along with related material, may be presented without observing the Section 73.658(k) limitations. These might include the summer and winter Olympics, the World Series, New Year's Day and other year-end bowl games, the Super Bowl, and possibly a few others; but we are certainly of the view that it should not extend beyond a small number of events.

36. Considering that sports events involving possible prime-time problems occur on only a limited number of days of the year—probably no more than 50 for each network—it appears that this subject may have aroused more concern, and required more action, than it is worth. It appears eminently desirable to adopt a definite rule, or at least an over-all policy, in this area. Comments are particularly desired on what actually is the impact from a relatively small and occasional "runover" on the availability of prime time to non-network sources. In other words, what do stations do if the event runs until 7:10 p.m. E.T.? Do they simply carry the same material they would have carried if the event had ended at 7, "clipping" it slightly, or do they substitute other, shorter material, and, if so, what? One thing which should be borne in mind, also, is that while the networks often put their requests in terms of being able to carry the event to completion, this is not usually true. Rather, it is a question of whether, if they do, they may still carry their full complement of evening material.[22]

37. *Relaxation of the "off-network" restrictions of the Rule.* Comment is invited on the following changes in the "off-network" restrictions of the rule, contained in Section 73.658(k)(5). One or more of the first four changes in the "off-network" restrictions set forth below may be adopted, with or without the fifth, which is really a somewhat different concept. The possible changes are as follows:

(a) Providing that the "off-network" restrictions do not apply to material which was not part of a regular network program series, i.e., an individual "special" program or a small series of material, say no more than six programs;[23] or providing that while the rule imposes a general restriction on all

[22] The discussion here, except for the fourth proposal mentioned above, relates largely to the late-afternoon situations. Sports events actually scheduled for prime time do not raise any great number of problems, and it appears that these may be handled by adjustments in time-computation along the lines mentioned in pars. 32-34, above.

[23] The rule as adopted in May 1970 actually read in terms of excluding only material which was "off-network syndicated series programs." The change to restrict off-network material generally was made in the August 1970 decision on reconsideration.

material, stations in the top 50 markets may present up to ____ hours per year of off-network material coming in the above categories (comments are invited on what this figure should be).

(b) Providing that a "package" of material may be presented including some, but no more than 25%, or some smaller percentage, of off-network material (e.g., special Christmas programs in the "Lassie" or other series).

(c) Providing that stations may present without restriction (or up to ____ hours a year) of "off-network" material, provided the material itself was not shown on a network within a certain number of years (e.g., 5) and the series of which the particular material is a part has not been on the network for a less number of years (e.g., 2).

(d) Continuing the 1972 arrangement of considering waivers of this restriction, on an *ad hoc* basis, but providing for more orderly treatment, including public notice of such waiver requests, and more or less simultaneous consideration of all such requests well in advance of the year for which waiver is sought (e.g., requests would have to be in by March 1, 1973 for the 1973–74 season, and decision would be reached by May 1). Comments are invited on whether, if such an approach is to be adopted, a certain total number of hours of off-network material should be permitted, and if so, what that figure should be.[24]

(e) Adoption of a rule looking toward the type of relaxation urged by MCA, Inc. in RM–1929, permitting any off-network material to be presented as part of a package of which at least 25% is new material. We also raise the question of whether, assuming such a relaxation is to be made, a higher percentage of new material, e.g. 50%, should be required.

38. The "off-network" restriction is potentially one of the most troublesome areas of the rule. It represents, not the objective of the rule to lessen network control of television programming (which is taken care of by the basic "three-hour" limitation plus the "syndication" and "financial interest" rules) but, rather, that of protecting the newly "cleared" portion of prime time for access by non-network sources of program material. As such, it obviously serves a needed purpose; but, at the same time, it is also a significant restriction, including in its present form a bar on the presentation of some highly worthwhile material, sometimes—as with "one-time" material, and probably short program series—material which if presented during prime time would not have a very substantial impact on the availability of time to non-network sources. The latter was one of our chief reasons for the grant of waiver to the six-program *Six Wives of Henry VIII* series (Time-Life Films 35 FCC 2d 773). For this reason, we raise the issue of whether relaxation should be considered along the lines of the first two approaches set forth above, or, alternatively, approaches (c) or (d), which would probably mean more relaxation. As elsewhere herein, parties opposing relaxation are urged to discuss the *impact and effect* of any such relaxation, by rule or waiver, on the availability of prime time to non-network sources of new material, with specific examples of actual or potential preclusion.

39. Item (e), above, inviting comments essentially on the *MCA* request or a modification of it, represents a somewhat different concept: whether, in view of the very high cost of and asserted risk involved in producing new material, it might not be desirable to permit a "mix" of new and off-network programs in a package, and, if so, what percentage of new material should be required. Parties supporting such

[24] Parties may wish to comment on this subject in light of the four decisions referred to in paragraph 48 below, concerning "off-network" material, and on the matter of objective standards which might be appropriate in this connection (see paragraph 40).

a change should discuss in detail the impact it would have on station purchase and presentation of truly *new* material.

40. In connection with this subject generally, and particularly the approach set forth as item (d), above, comments should discuss to what extent the judgments involved here can appropriately reflect program quality determinations, and, if they can or must, what objective standards can be formulated in this connection so as to avoid subjective judgments. With respect to items (a) and (b), above, comments are invited on whether this type of exemption should be granted only in the news and public affairs area, and what is the availability of this highly important type of material from non-network sources.

41. "*Feature film*". Section 73.658(k)(3) also contains restrictions on the use of movies during the cleared portion of prime time; as the rule reads, there is an ambiguity as to whether a film previously shown as a *network program* is thereafter "an off-network" program, permanently barred from these hours, or is a "feature film" which can be used in them after two years from its previous showing. It appears that other changes may also be appropriate. Comments are invited on one or more of the following changes:

(a) Clarification of whether a movie previously shown on a network is an "off-network program" or a "feature film" for purposes of Section 73.658(k)(3), and which of these two alternative constructions would most serve the public interest.[25]

(b) Whether, in this respect, there should be any difference between movies *originally made primarily for theatre exhibition*, and those *primarily made for television* (e.g., treating the former as "feature films" but the latter as "off-network" programs); and if there is to be a difference, what test should be applied if there is any question (e.g., where the film first appeared).

(c) Whether it is really in the public interest and consistent with the basic objectives of the rule to permit during "cleared" time the use of feature films shown in the market as recently as two years ago, or whether instead this period of prohibition should be longer, such as five years, or perhaps permanently with respect to a previous showing on the station itself.

(d) Whether, on the other hand, in view of the economic structure of the film-buying business, the "two year" period should be shortened, say to one year, at least as to feature films bought by the station up to mid-October 1972 (this is essentially what is urged in a pending request by a Salt Lake City station).

42. Aside from the obvious desirability of removing the ambiguity mentioned, this subject presents some more basic considerations. As far as the presentation of an individual film is concerned, it probably makes little difference to the viewer if it appeared previously in the market as a network program or a locally shown film, or whether it was created for theatre showing or especially for television. From this standpoint a fairly liberal approach might not be inappropriate.

43. But there is also another consideration. The use of "feature films" during early evening hours by network stations in the top 50 markets has not up to now been great, averaging only about one hour per week per market of prime time according to ARB audience survey data for February–March 1972. However, there are some indications that this may increase, particularly if the Commission adopts a rather liberal

[25] If network-shown movies are to be treated liberally, comments are invited on a matter which has been raised: how can "feature film" be defined so as to prevent a high percentage of network entertainment programs being classified as "feature film" so as to get this more liberal treatment?

view, so that stations in these markets will devote a considerably larger amount of time to such material. This would, of course, have an impact on the availability of prime time to other kinds of non-network material (local or syndicated). While the rule was not designed to promote any particular type or form of programming, it was certainly intended to promote *new* non-network material; and presentation of movies already shown looks in the other direction. Comments on this point are invited.

44. The same general considerations might also indicate a lengthening of the "two-year" period for any film, and particularly where the previous showing was on the station itself—a situation in which, normally, there should be no problem in determining whether or not a given movie was or was not run in the past, even years ago. This was the reason for limiting the period to two years on reconsideration in August 1970. Comments are invited on whether it would be appropriate to bar permanently from the cleared hours feature films previously run on the same station, as well as on the desirability of lengthening the period generally. On the other hand, the point has been urged recently that the usual basis on which films are bought—such as "five years and five runs" at a very high price—almost automatically requires that more than one of the runs be in prime time, if the station is to be able to recover its investment. It is urged that therefore a lesser restriction should be adopted, as to the station's re-use of its own material. Comments are invited.

45. *Exemption for regular network news following an hour of local news, and for one-time (or other) network news and public affairs programs.* Comments are invited on adoption of one or more of the following, as a matter of rule or at least of fixed policy:

(a) Continuing for the future (and putting into the rule) the policy adopted for 1971–72, and recently for 1972–73, concerning a waiver for network news at the beginning of prime time where it follows a full hour of local news (e.g. from 6–7 E.T.). Under this policy, such network news does not count against the permissible three hours.

(b) Continuing, for 1973–74 and later years, the waiver or exemption granted for one-time network news and public affairs programs ("documentaries").

(c) Affording an exemption, for 1973–74 and later, for network news and public affairs programs generally.

46. As to the first matter mentioned, we have favored this policy. As we have noted, the broadcast of in-depth coverage of local news and problems, in major cities, is to be encouraged as definitely in the public interest; and, as a practical matter, stations can avoid the impact of the rule anyhow by splitting their news, so as to present a half-hour of local first, then network (e.g., at 6:30 p.m. E.T.), and then local against at the beginning of prime time. There appears no reason to require this "bracketing" form of scheduling as a matter of rule, although 19 stations in the top 50 markets do it (25 operate under the waiver). On the other hand, this does represent a substantial impingement into the availability of prime time to non-network sources; and comments should be invited at this time on whether this policy should be made permanent.

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47. The second matter is perhaps more difficult. The rule contains an exemption for "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events", etc., but not for news or public affairs "documentaries", although when the rule was adopted there was some thought that the exemption should be broader to include them. (See concurring statement of Commissioner H. Rex Lee in FCC 70–466, 23 FCC 2d 428). There is, obviously, a high degree of importance to the presentation of such material in quantity, for the better information of the audience, and, at the same time, *diversity* of viewpoints and sources is probably more important here than it is with entertainment programming which is the main thrust of the rule. There is also a practical consideration: a number of programs presented by the networks during 1971–72 year have involved partly "on the spot coverage of fast-breaking events", etc., but partly background material of a documentary nature; and without the waiver, network staffs, and the Commission, might be faced with a fairly knotty problem of what *is* "on the spot coverage", what are "fast-breaking events", etc.[26] Existence of the waiver does serve in this respect to make life simpler. Comments on whether this exemption should be made permanent are invited, including, particularly, *the matter of to what extent such material is available from non-network sources*. Item (c) above requires little elaboration. As noted, the matter of a general exemption for this type of network material was considered at the time the rule was adopted, and has been raised again; in this general overview parties are free to comment on it.

48. *Comment on waiver actions.* Parties are invited to discuss certain waiver actions of the past year, including, particularly, the four involving "off-network" material (*Wild Kingdom, Lassie, National Geographic*, and *Six Wives of Henry VIII*), the *ABC Summer Olympics* decision, and the decision granting CBS waiver for one-time network news and public affairs material, or documentaries. We do not expect, nor require, that comment will be made separately on these matters; but rather that parties will discuss them in connection with specific changes in the rule, set forth above. They are set forth separately simply to call attention to them as problems which have arisen with the rule in its present form. Inviting comment on them does not represent a Commission view that they were wrong, but, rather, that to some extent they were reached on the basis of rather limited information, early or at least fairly early in the administration and application of the rule; and comment should be entertained before we decide whether the policies involved in these decisions (or the reverse of these policies, as some may argue) should be adopted as a permanent matter.[27]

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[26] If an exemption or waiver policy for "one-time" network programs of these types (or more generally for such network material) is not adopted, it may well be desirable to adopt more definite standards as to what are programs falling within the exemptions now specified, for "on the spot coverage" and "fast breaking news events." Comments on possible standards are invited, for example a requirement that the program must contain a high percentage (e.g., 75%) of "live" coverage, or film shot within the last 24 hours, rather than being substantially background material.

[27] The citations to these six decisions are, respectively: *Mutual Insurance Co., of Omaha*, 33 FCC 2d 583 (Wild Kingdom); *Campbell Soup Co.*, 35 FCC 2d 758, 24 R.R. 2d 856 (Lassie); *Storer Broadcasting Co.*, 35 FCC 2d 889, 24 R.R. 2d 868 (National Geographic); *Time Life Films*, 35 FCC 2d 773, 24 R.R. 2d 849 (Six Wives of Henry VIII); *American Broadcasting Companies, Inc.*, 35 FCC 2d 340 and 765, 24 R.R. 2d 628 and 862 (Olympics); and *Columbia Broadcasting System, Inc.*, 32 FCC 2d 55 and (for 1972) FCC 72-906 (October 11, 1972).

49. *Repeal of the rule.* Repeal or rescission of the rule will be considered herein, for the reasons and subject to the limitations set forth in paragraphs 13–15, above. Parties may also wish to discuss—if they urge such rescission—alternative approaches to the problem of network control over television programming. As to the latter, obviously this is an Inquiry proceeding only.

50. *The cumulative impact of the relaxations mentioned above.* We have set forth above possible relaxations of the rule in a number of different areas. It is realized that the various changes, if made in the different areas, might have a *cumulative* impact on the availability of prime time to non-network sources, even though the impact from some of them individually might not be significant. Comments on this aspect of the matter are invited, along with views as to which are the particular "problem" areas from this standpoint.

C. *Inquiry into other possible changes in the rule* (extensions of its scope, etc.)

51. This portion of the Notice—an Inquiry only, with changes along these lines to be adopted, if at all, only after further rule-making proceedings—is designed to invite comments on some changes in the rule of a more fundamental nature than those mentioned in subsection B, above. As discussed in the following paragraphs, these include: (1) extensions of the scope of the rule, either as to time or as to markets covered; and possibly extending the "off-network" and "feature film" provisions of the rule to independent stations at least in some circumstances; (2) imposing certain requirements on stations as to use of the "access period", e.g., for local programming, children's or "minority group" programs, etc.; (3) exemptions from the rule to encourage the presentation of certain types of material on either a network or "off-network" basis (children's programs, etc.)[28] and (4) changing the form of the rule so as to specify a definite hour as the "access period", which might be a later hour than the first hour of prime time which is now generally "cleared" under the rule as it operates in practice. Setting these concepts forth, and inviting comments on them, does not by any means represent a Commission view that they should be adopted, now or ultimately, and in fact some Commissioners have doubts as to whether some of them are either realistically feasible or otherwise desirable; but they have been suggested and appear to have enough relationship to public-interest objectives to warrant opportunity for exploration in this over-all proceeding. One other matter should be pointed out: as indicated elsewhere, we regard expeditious resolution of the present proceeding as highly important; and if the time frame established does not permit thorough exploration of the various concepts set forth in this subsection, that will have to wait until later, to the extent it is appropriate.

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[28] This is the same type of concept involved in the general exemption for network news and public affairs programs set forth in subsection B, above.

52. The following are the concepts on which comment is invited:

(a) *Possible extensions of the scope of the rule.*

(1) Limiting network prime-time programming to 2½ rather than three hours per night, so as to clear 1½ hours for non-network use (or at least providing for this in the case of stations presenting local or network news at the beginning of prime time, so that they would have a full hour cleared for other non-network material).

(2) Extending the coverage of the rule to markets beyond the top 50, possibly to all markets having three or more network-affiliated stations.

(3) Having the "off-network" and "feature film" restrictions apply to *independent* stations (or at least independent VHF stations), to the extent of one hour at least per night.

(b) *Required local uses of the access period.* A requirement that some (or conceivably all) of the cleared "access period" time be devoted by affiliated stations covered by the rule to certain types of non-network material; including:

(i) local "live" programming (comments are invited on whether this should be required to be actually "live" or could include filmed material treated as live under the Commission's Rules).

(ii) programming designed for particular groups, such as minority groups (for example, the four specified in Section 73.680 of the Rules, and other "ethnic" groups), or children.

(iii) programming specifically designed to deal with the important problems in the station's community and coverage area as indicated by the licensee's survey to ascertain the needs, interest and problems of its community and area (generally this would be local material, but conceivably it could include syndicated programming of certain types).

(c) *Encouraging, by way of exemption from the rule's restrictions on network and "off-network" material, the presentation of the same general types of material mentioned in (b),* above (similar to the general exemption for network news and public affairs material covered under subsection B, above). Under such an approach, network or "off-network" material falling into these categories would not be counted for the purpose of computing the permissible amount of such material.

(d) *Specifying a particular hour as the "access period", for example the third hour of prime time* (9–10 p.m. E.T. and P.T., 8–9 p.m. C.T. and M.T.).

53. The first two matters mentioned above—extensions of the rule either as to time or as to markets covered—has been suggested by various persons largely on the basis that, if "cleared time" in major markets is a good thing, why is not more such time in more markets even better? As to the matter of time, this of course would mean more prime-time availability to alternative program sources; in particular, for the stations which present news at the beginning of prime time—about half of those in the top 50 markets—it would mean a full hour of non-network programs. As to the matter of geographic extension, one specific suggestion has been made as follows: while access to major markets is almost indispensable to the success of syndicated material, general access is also significant. One index of the success of a syndicated program is a percentage figure, shown in ARB and Nielsen reports: the percentage of the nation's TV homes which are in the "areas of dominant influence" (ADI's) of stations carrying the program. It is said that, as a very rough rule of thumb, a program producer is justified in spending $1,000 per episode on the production of a program, for every percentage point the program has, or is expected to have. It is asserted that extending the "prime time access rule" would tend to increase this percentage figure somewhat, with respect to clearance in

the smaller markets, and therefore would mean more production expenditure and—perhaps, to some extent—better programs.

54. As to independent stations, it is sometimes claimed that it is unfair for *independent* stations in the top 50 markets to be free of all restrictions under the rule, for example being able to present "off-network" material during prime time in unlimited quantity. This argument is particularly made as to VHF independents, most of which in the top 60 markets are profitable, and sometimes highly so. Comments are invited on whether the "off-network" restrictions should be extended to such stations, for example so as to require an hour of prime time each night to be devoted to material which is neither network, off-network, nor feature film recently shown in the market. Comments are also invited on whether such an extension, if adopted, should be only to *VHF* stations, recognizing the particular problems which UHF stations still have.[29]

55. The second general area of inquiry is whether the public interest would be better served by requiring certain uses to be made by stations of the non-network portion of prime time, for example local programming, children's programming, or programming of particular significance to minority groups or meeting important local problems. To a degree, perhaps, this represents a shift in emphasis away from the matters stressed in the Report and Order adopting the rule, particularly insofar as this would encourage local rather than non-network syndicated material. A number of parties have expressed the view that this would be a good idea, more in accord with long-standing Commission objectives. It warrants exploration here, for one reason because of assertions (by the rule's critics such as NBC in its petition) that the rule in its present form produces mostly continuations and revivals of network series, often daytime material such as "game shows", whose proliferation does not necessarily warrant encouragement. Comments on these concepts are invited.

56. The same general type of consideration is the basis for the third general area—whether the presentation of certain types of programs should be encouraged, from network or "off-network" sources, by granting them exemption from the three-hour limitation.

57. The last matter mentioned above—changing the rule so as to provide a definite, and probably later, cleared portion of prime time—is one which has been suggested by certain syndicator parties. The argument is that, as the rule now works, the "cleared" portion of prime time is generally the first hour, 7–8 p.m. E.T., a time when the audience is somewhat smaller than it is later, and also when many children are watching. It is said that if the time were made later, such as 9–10 p.m., the audience would be larger, and, also, it would be more entirely an adult audience. The latter, it is said, would permit more "innovative" programming than that appropriate earlier, when a substantial part of the audience is young people. Comments are invited on whether such

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[29] It appears likely that such a change, if adopted, would not have any marked consequences. Probably few independent stations present off-network syndicated material for more than three hours of prime time, since usually a movie is inserted into the schedule somewhere during the evening. However, the movie would be subject to the "two-year" restrictions of Section 73.658(k)(3), if such a change were made.
Comments are invited on whether another change mentioned in above, specifying a particular hour as the access period, should be applied to independent stations.

a change would be appropriate, and, if so, what form of rule could be devised to reach this result.

III. SUMMARY

58. In view of the considerations set forth above, comments are solicited on the various matters mentioned, which in summary are the following:

(a) *Gathering information as to the effect and impact of the rule and possible changes in it*, particularly on the programming being and to be presented, and the economic consequences on stations (particularly in small markets) and the TV production industry, and the economics of program production and distribution. See pars. 16–25 above.

(b) *To what extent*—in practice as well as in theory—*the rule promotes real diversity* in program sources, program ideas, and programming itself. See paragraph 18 above.

(c) *Possible adoption of a "21 hours a week" standard, or some partial move in that direction.* See pars. 29–31 above.

(d) *Other possible changes in computation of permissible programming during prime time*—a change to take care of the few "non-daylight saving time" markets, and a possible change to increase the extent to which programming arrangements acceptable for Eastern and Central time zone stations will be acceptable for Mountain and possibly Pacific, zone stations. See pars. 32–34 above.

(e) *Rules to deal with sports events*, in particular late-afternoon "runover" situations and "pre-game" shows; and also a possible rule listing a few important events (the Olympics, the World Series, etc.) which might be suitable for presentation without regard to the basic limitation of the rule. See pars. 35–36 above.

(f) *Relaxation of the "off-network" restrictions; and modification of the "feature film" restrictions*, in Section 73.658(k)(3), in the former respect to permit a limited amount of off-network material and, possibly, a rule to permit generally the use of off-network and new material in a "package", along the lines urged by MCA, Inc. Clarification of the "feature film" provision, as to feature films shown as network material and feature films produced primarily for TV rather than theatre exhibition, is also proposed. See pars. 37–44 above.

(g) *Continuation of waiver or exemption with respect to news and public affairs programs*, after October 1, 1973: the waiver for network news following a full hour of local news, and for "one-time" network news or public affairs programs, or documentaries, or a more general exemption for this type of network material. See pars. 45–47 above.

(h) *Repeal of the rule.*

(i) *The possible cumulative effect of relaxation* in various areas mentioned (par. 50, above).

(j) *Possible extensions of the rule or further exemptions*, as to which this is an Inquiry proceeding only. See pars. 51–57 above.

59. This Inquiry and Rulemaking proceeding is instituted pursuant to authority contained in Section 403 and Sections 4(i) and 303 (b), (g), (f), (i), and (r); 307(d); 308(b); 309(a); 313, 314 and 315 of the Communications Act of 1934, as amended.

60. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before December 22, 1972, and reply comments on or before January 29, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken herewith. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice. For reasons stated in pars. 13–15, above, parties are herewith notified that the above timetable, which appears adequate, will be adhered to.

61. In accordance with the provisions of § 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur in the Notice of Inquiry and Proposed Rule Making. I hasten to add that this should not be interpreted as dissatisfaction with the existing rule but rather as an opportunity to review it with the expectation that the objectives of the rule may be improved.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the decision to initiate an inquiry into the effect and operation of the prime time access rule (Section 73.658(k) of the Commission's Rules) primarily because, as a general proposition, I favor an administrative agency's review of past regulation. However, my concurrence should not be interpreted in any way as either a repudiation of the rule or a prejudgment of the inquiry proceeding.

I would have preferred to delay the Commission's review of the prime time access rule in order to permit a more meaningful assessment of its impact during the current television season, *i.e.*, 1972–1973, when the full force and effect of its provisions become applicable. Although I have no preconceptions about the use of prime time repeat material by the networks, as the majority decision indicates, there appears to be a relationship between the prime time access rule and television "re-runs." In fact, it is even suggested that "parties may wish to prepare their comments herein with this in mind." It seems to me that a more orderly course of action would be to consolidate the prime time access inquiry with an investigation into the ramifications of a limitation on network television "re-runs."

One other matter deserves consideration. At the time the Commission adopted the prime time access rule in 1970, I indicated that I was in favor of a provision which would have exempted news documentaries from the scope of the rule. It was my belief that failure to adopt such an exemption would tend to discourage the network presentation of news documentaries. I would hope that interested parties would comment on the validity of my earlier prediction in light of actual experience under the rule.

SEPARATE OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

In 1970, after years of investigation and analysis, this Commission concluded that the domination of the television program production market by the three networks required Commission action. As part of

that action, the Commission required that television stations in the top 50 markets take no more than three hours per night from the three networks. At least one hour had to come from independent producers, including the stations themselves. For at least one hour per night, there would be 150 buyers of television programming (three network affiliates in each of so markets) rather than three networks.

In the words of the Commission:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.
>
> In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies.[1]

In affirming the Commission's action, the U.S. Court of Appeals for the Second Circuit commented:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . . The evidence demonstrates that despite the fairly wide range of choice available to licensees, they have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real constraint on licensees in that they will not be able to choose, for the specified time period, the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public. (emphasis in original).[2]

Now this Commission is embarking on a new proceeding to examine the functioning of the prime time access rule, propose modifications of it, and to consider its demise. Since I would have followed a substantially different course, I am compelled to dissent.

At the outset, one should note the extreme handicaps under which this rule has functioned in the short time it has been in effect. First, the Commission substantially undercut it by permitting off network material to fill the access time during the first year of the new rule. Second, roughly 75% of all requests for "waiver" of the rule have been granted by this agency. Third, the rule has never enjoyed unanimous support either here or in the White House. (Recently the trade press reported three sure votes for repeal of the rule.) The White House continues its partisan wooing of certain segments of the Hollywood community and networks by promising favorable FCC action.

I hasten to add that I believe my colleagues when they say that no decision has been made, that the presumption favors retention of the rule, and that they are perfectly willing to listen to arguments as to why the rule should be retained and even expanded. And I believe they are going to be surprised by the degree of support the rule will command in this proceeding. I doubt that the rule will be scrapped, or that there will be a return to the status quo, and I will have more to say about this later.

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[1] Network Television Broadcasting, 23 F.C.C. 2d 382, 894–95 (1970).
[2] Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 478 (2 Cir. 1971) (footnote omitted).

Another difficulty with this proceeding is the relative lack of information and analysis before the Commission regarding the basic facts surrounding this rule. As I have said over and over again, I believe this Commission simply must have a policy planning and analysis capability to provide the information necessary for rational decisionmaking. I would have hoped that this agency might have an analytic capability for an ongoing analysis of the structure of the television industry. Instead, we rely on not very systematic splurges in the Delphi technique, and we usually ask only those who have an economic interest in a policy outcome. But with the understanding that what follows is scarcely better than speculation, I think it useful to examine the effects of the rule on the principal groups affected by it.

Consumers. "Consumers" is the economist's euphemism for the viewing public. The quick and dirty analysis is that the apparent impact of the rule viewers are watching less television, and watching stations other than network affiliates. Perhaps, one might argue that therefore, consumers are watching programs (or doing other things) that bring them less satisfaction than the network programs did, and that there is therefore a net loss of consumer satisfaction. This analysis neglects some very hard questions about changes in consumer tastes and preferences, as well as problems with comparisons of interpersonal utility preferences.* And the evidence to support it is ambiguous at best. Counterbalanced against it is some evidence of increased choice, and more local programming. There is apparently some evidence of less network news and public affairs, and children's programming being deferred to later in the evening.

Networks. The dollar and cents effect appears minor, except that ABC, which supports the rule, seems to have been helped competitively.

Top-50 market network affiliates. This group appears to be better off financially as a result of the sale of commercials in purchased programming, rather than the revenues from network programs.

Smaller market affiliates. The networks might have elected to program this group for their affiliates in markets below the top 50. They choose not to. As a result, these stations have been adversely affected, although less than might have been expected.

Independent stations. There seems no doubt that these stations have been helped, in that they are now competing on a more equal footing with affiliates.

Program producers. Those who produce programs for the networks have probably been hurt; those who produce independent programming have been helped. There seems to be more imported programming in prime time—for whatever reason. And the overall budget for program production may have declined as lower cost programming is produced and shown.

The FCC. The objective of the rule—deconcentrating the television program production market—seems to have been achieved, although the magnitude of that achievement in the scheme of things is in question. The administration of the rule has created endless headaches, and simplified FCC administration plays no small part in generating the present proceeding.

My own approach to this proceeding would have been to take a substantially different course. The majority is, in effect, conducting a "go-no-go" proceeding on a rule that is barely into a trial period. It sets rigid schedules for consideration, without knowing whether it or other parties are likely to be in a position to make a rational policy choice. The majority also apparently believes that it makes sense to consider a complete return to the network power situation that existed prior to 1970. Unless something has changed since 1970 in the basic competitive relationships in the television industry, I don't see how the Commission can return to that unsatisfactory situation. I see no evidence that such a change has occurred. The majority cites none.

Former Commissioner Cox, in his usual insightful way, predicted our current position when concurring in the adoption of this rule in 1970:

> If [the rule does not have the desired result], I think the networks and their affiliates may face even more drastic action. As indicated by its filings in this proceeding, the Department of Justice has serious concerns about the state of the market for television programming. If the Commission waters down its action here, or if the new rule does not in fact open up the market, then I think it possible that the Department will proceed under the antitrust laws to apply the policies developed in the motion picture industry to broadcasting. Or the Commission itself, if faced with the permanent prospect of a slowly constricting program production industry, may decide that the only alternative is to attempt some kind of detailed regulation of the networks' program practices.
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> * * * * * * *
>
> I therefore hope that, after a necessary period of readjustment, the rule we have adopted will generate a substantial flow of new programming for sale direct to stations and cable systems, without passing through the network selection process. If it does, I think we will have a healthier television industry. If it does not, then I fear that the industry may very well undergo very serious changes in form and character.[3]

There is an antitrust suit pending in California, which followed an FCC waiver of the prime time access rule in major part for the first year, combined with an FCC stay of other aspects of its action which remained in effect for about a year after the rules were affirmed in court. I am not sure it is cause for industry celebration that the FCC is considering abandoning rules adopted to deal with a serious competitive problem.

I would not have turned this proceeding into a "go-no-go" rulemaking, nor would I impose a rigid decision making schedule, when it is not known that the facts necessary for a rational decision are going to be available. And if the rule is to be abandoned, it must be replaced with a substitute calculated to meet the problem of network power, and designed to accomplish more than would be accomplished if the rule were retained. It was for these reasons that I made certain suggestions to my colleagues for areas of inquiry to consider alternatives to the rule. Some were incorporated and I need not dwell on them. Many were not and I want to discuss them here in the hope they will generate thought and perhaps future consideration.

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[3] Network Television Broadcasting, 23 F.C.C. 2d 382, 427-28 (1970).

Some concern was expressed that a more thorough proceeding would be delayed. But surely a graduated set of response dates would permit all the majority seeks in terms of time schedule.

To introduce the subject areas I believe warrant comments and inquiry, I should like to note some views expressed in 1970, at the time the prime time access rule was adopted. In the only telling portion of his dissent, Chairman Burch, in an opinion joined by then Commissioner Wells, said:

> [R]ather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.
>
> First there is subscription television, which has a different economic base and and can present programming that is not necessarily designed for a mass audience and will still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programming. There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.[4]

Noble words and an inspiring program for Commission action. I might have endorsed it myself: it is certainly consistent with my oft-expressed preference for competitive solutions rather than regulatory ones. The statement seems to acknowledge that a serious problem exists. The only question is the best solution and how to bring it about.

But what has happened in the past two years? Subscription television, shackled with restrictions, is still non-existent, and the thrust of Commission policy is toward ever more stringent restrictions. Cable television is strait-jacketed in a policy born of a political deal calculated to blunt its promising competitive benefits—not to mention the morass of more than 1000 applications pending and stymied here. And public broadcasting is suppressed in a political power play and capture to which I heard no protest from the Commission majority. In each of these areas, the FCC abandoned any thought of a leadership position. I do not oppose the consideration of alternatives so long as it is not done as mere chicanery to effect delay and postpone solutions opposed by powerful interests.

If the problem, most broadly stated, is network domination, and if there is still interest in discussing alternatives, let them be considered. What follows are ideas. The majority refused even to include them in its notice. I neither support nor oppose them. But I do think they are worthy of inquiry.

(a) As an alternative means of increasing the number of buyers for television programming, and increasing the diversity of programming available to viewers, UHF stations (and vacant or unassigned UHF allocations) could be realigned into stations with significantly higher power, capable of serving wide regions, with the possibility of attracting audiences to compete with network affiliates, and the possibility of interconnecting them into a new network.

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[4] Network Television Broadcasting, 23 F.C.C. 2d 382, 416 (1970).

(b) Networks could be required to allow every station in the market to bid for network programming on a per-program basis, giving every station an opportunity to acquire network programming. Independent producers would also compete for station buys without having to face a fixed network affiliation for major stations in the market.

(c) Networks could be required to allocate their prime time programming on a pro rata basis among all the stations in the market. For instance, if there were six commercial stations in the market, and three networks each programming four prime time hours per night (84 hours total network prime time per week), no station could receive more than two network hours per night, or 14 hours per week. The economic benefits of networking would be spread among *all* stations in the market UHF and VHF alike. Independent producers would also have a prime time market comparable to networks. New stations coming on the air would have an assured source of programming.

(d) Networks could be required to program no more than 25% reruns per year. This question is directly related to issues and questions concerning the prime time access rule, and should be considered with it.

(e) Networks could be required to divest themselves of television program production facilities and talent agencies as well as any remaining syndication activities domestically or in foreign markets. This agency has apparently made an informal decision, never actually considered by the Commissioners, to do nothing about the Department of Justice suit against the networks, although arguments are being made that the subject matter of the suit is a matter within the FCC's primary jurisdiction. I dislike the continuing erosion of the FCC's power to affect the industries it regulates, but certainly there is no more powerful argument for that erosion than inaction, or action that fails to meet public interest needs, whether it be under the Communications Act or the antitrust laws.

(f) A final alternative could involve a seeming strengthening of the networks' monopoly position in an effort to, in fact, reduce it. One of the oft-overlooked reasons for the "quality" of the BBC's programming is that it is not one network but two. Thus, the "opportunity cost" of putting on minority appeal programming is virtually eliminated. (Opportunity cost is an economists' expression for what you lose by choosing a particular course of action. When an American commercial network chooses to put on programming that does not maximize audience it not only loses the production costs of that program, it also loses the "opportunity" to make the much greater revenue that a mass appeal program would create.) If a diversity of programming is what is desired, that can be created by creating a monopoly as well as by eliminating one. For example, if a means could be found whereby an individual network not only could, but would be required to, program every *station* in a given market, the net effect might well be *more* diversity than that created by three networks, each trying to copy each other's efforts to attract the entire audience (and ending up with about one-third each). Mass appeal programming would undoubtedly go on one, two, or three of the channels. But even it would be counter programmed—that is, sports on one, a movie on another, and so forth. And the remaining channels

would undoubtedly be programmed with minority appeal programming of various kinds—in an effort to attract to television persons who would not otherwise be watching any television at all, and thereby increasing the total television viewing audience for the network. In exchange for this seeming monopoly advantage, we could require that no network could program more than one hour a day, or whatever, to reduce the barriers to entry into the networking business and increase the number of networks. If there were hours when no networks were programming at all, the proposal would, to that extent, create a market for the programming of independent producers as well.

(g) Networks or stations could be required to present a certain amount of material designed for particular groups (see section b, paragraph 52 of the majority Notice) or news and public affairs each night or each week as a condition to a recision of the rule.

These are ideas I believe relevant to any consideration of where the FCC goes with the prime time access rule. No doubt there are others. No doubt some could be rejected quickly once they were subjected to detailed analysis. I express no preferences for any. Each has a similar goal to that of the prime time access rule, however, to improve the competitive, free private enterprise functioning of the television program production market. Several alternatives approach the problem from a wholly different direction than that of the prime time access rule.

The FCC ought to be in the business of freely exploring, analyzing, and testing the alternatives for the benefit not only of the viewing public but the industries and unions involved as well. Its refusal to do so prompts this dissent.

"'Utility preferences" is economists' jargon for describing the variety of tastes and desires of individual consumers. Any single viewer-consumer has his own preferences for television programming—as well as for a host of other ways in which he might spend his time. The difficulty arises when one tries to add together the preferences of large numbers of consumers to decide whether consumers as a whole are better off or worse off as a result of alternative sets of programming fare. Suppose the effect of the prime time access rule is to eliminate certain network programming and reduce the number of viewers watching any television program, or that different programs are watched than would be the case without the rule. Then, so the argument goes, the total consumer-viewer satisfaction is less than when the additional network programs were available. The problem with this analysis is that no one knows how much loss a viewer suffers by doing something other than watch television, or by watching one program rather than another. There is a question whether consumer satisfaction for individuals can be added at all. No one knows whether those viewers who stopped watching television, or shifted to other programs because of the prime time rule, are essentially indifferent to the change. Viewers who watch the programming that replaced network programming because of the rule may find the new programming greatly preferable to their prior alternatives. And even this analysis presupposes that television watching is a net consumer benefit. The viewer is not, of course, the consumer—he is the product

sold by the advertiser (who *is* the consumer). Programming is virtually irrelevant in such a market analysis. (Various forms of subscription television, by contrast, *do* turn the viewer into a market place participant in the program selection process.) Nor is television watching necessarily a benefit at all. See the Kerner and Eisenhower Commission Reports, the Surgeon General's Report on violence in children's programs, *How to Talk Back to Your Television Set* and *Test Pattern for Living*. Mason Williams has said, "I finally decided the best I could do for television was not at all." After observing the industry's insensitivity to the impact of programming and commercials on small children (during the FCC's children's television hearings) I was prompted to recommend legislation to Congress making it a felony for anyone to keep a television set receiver in a home containing children under the age of six. In short, I am not sure that "utility preferences" is a concept that can contribute much to our analysis of the prime time access rule. But as long as we give Nobel Prizes in economics for the idea, the least the FCC can do is to hear it out.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

IN RE: Notice of Inquiry and Proposed Rule Making in Prime Time Access Rule Matter.

There is no question in my mind that a re-examination of the direction and effect of the "Prime Time Access" Rules is necessary and desirable. I concur in initiating this analysis.

However, inasmuch as we are focused on the subject of Prime Time broadcast fare, I would have specifically requested an exploration—through comments and otherwise—of the possibility of requiring that a certain share of Prime Time be dedicated to local news and public affairs should the present Prime Time Access strictures be extinguished. See, in this connection, Notice of Inquiry In re: Formulation of Policies Relating to the Broadcast Renewal Applicants, stemming from the Comparative Hearing Process (F.C.C. 71-159, Docket No. 19154 released February 23, 1971), 27 F.C.C. 2d 580 (1971).

F.C.C. 73-657

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE," SECTION 73.658(k) OF THE COMMISSION'S RULES	Docket No. 19622
Petitions of NATIONAL BROADCASTING CO., INC. (NBC)	RM–1967
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)	RM–1935
KINGSTIP COMMUNICATIONS, INC. (KHFI–TV, AUSTIN, TEX.)	RM–1940
For Deletion of the Rule MCA, INC. To Permit Use of "Off-Network" Material Plus 25 Percent New Material	RM–1929

NOTICE OF ORAL ARGUMENT

(Adopted June 15, 1973; Released June 18, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. Notice is hereby given of oral argument to be held in the above-captioned proceeding, on *Monday and Tuesday, July 30 and 31, 1973*, at the Commission's offices in Washington, D.C. (Room 856, at 1919 M Street, N.W.) beginning at 9:30 A.M. (DST) Parties wishing to appear and participate shall notify in writing the Chief, Office of Network Study, by *Friday July 6, 1973*, setting forth the amount of time which they request. A schedule of oral argument will be issued later, after review of these requests.

2. While the record in this proceeding contains enough material so that a decision could possibly be issued on the basis of it, the Commission believes that in certain areas additional information and argument would be helpful. Also, in recent weeks there have been a number of late-filed comments and informal submissions, and it is believed that such parties, and parties who may wish to reply to such submissions, should be heard in a formal proceeding.[1] It is not anticipated that the holding of such oral argument will delay decision herein beyond September 1973. Meanwhile, probably before the end of June, we will

[1] Comments and letters filed since June 1 by Viacom International, Inc., ABC, MGM Television, National Committee of Independent Television Producers, and Worldvision Enterprises, Inc., are being placed in the docket in this proceeding.

issue decisions concerning various pending matters relating to the 1973–74 broadcast year ("off-network" waiver requests, sports waivers, etc.).

3. The Commission is not specifying the subjects to which discussion is to be limited. We call attention to two areas which we hope will be covered. The first of these is the "impact on U.S. program production activity and employment" which has been asserted vigorously as reason why the rule should be repealed, and vigorously disputed by proponents of the rule. Comments are invited as to what extent this is a consideration relevant to our evaluation of the rule, and, to the extent it may be, what the facts are as to the loss in network program production activity (and resulting employment), and as to the gain in such activity and employment from the production of the first-run syndicated and local material which has replaced network programs during the "access period". The second area is information as to the number and types of syndicated and local programs (U.S.-produced or foreign) which are likely to be shown on stations during the "access period" in 1973–74, and in the future to the extent that is predictable. We also emphasize that the Commission in its decision herein is free to consider, and parties may wish to discuss, a wide range of alternatives, from leaving the rule essentially *as is* with minor changes, to repeal, and of course including various "in-between" approaches.

4. All interested parties, whether or not they have previously participated in this matter, will be heard to the extent that time permits. In order to conserve time, parties with generally the same interest or position, such as the various film producers who have vigorously urged repeal of the rule, are urged to consolidate their presentations. Also, since this is in large part an effort to gather information, we hope that parties themselves, as well as attorneys, will participate or at least be available to respond to questions which may arise. Besides parties with a financial interest in the decision herein, we hope that others knowledgeable as to the matters involved, such as economists, will participate. Furthermore, while of course it may not be possible to accommodate all viewers who might wish to be heard, we hope there will be at least some presentation of the viewpoint of the "ordinary viewer".

5. Parties wishing to participate in the oral argument, and others, may file written material with the Commission by *Friday, July 13, 1973* (an original and 14 copies). However, while such material will be entertained and considered, its filing is not encouraged, except as to the areas mentioned in paragraph 3. In particular, parties who have already filed material herein are urged not to repeat it but simply to refer to it in whatever material they submit at this time.

6. If it appears that pertinent material would be developed, the Commission reserves the right to recall, on Wednesday, August 1, if possible, otherwise on a date very shortly thereafter, participants in the oral argument for further discussion.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-712

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", SECTION 73.658(k) OF THE COMMISSION'S RULES	
Petitions of:	Docket No. 19622
NATIONAL BROADCASTING CO., INC. (NBC)	RM-1967
MIDLAND TELEVISION CORP., KMTC, SPRINGFIELD, MO.	RM-1935
	RM-1940
KINGSTIP COMMUNICATIONS, INC., KHFI-TV, AUSTIN, TEX.	RM-1929
For Deletion of the Rule	
MCA, INC.	
To Permit Use of "Off-Network" Material Plus 25 Percent New Material	

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 5, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON, H. REX LEE AND HOOKS CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Modification of Issues Specified in Notice of Oral Argument" filed on June 26, 1973, by Westinghouse Broadcasting Company, Inc. (Group W). The Commission issued a Notice of Oral Argument, FCC 73-657, June 18, 1973, which set the above captioned proceeding for oral argument on July 30 and 31, 1973. This proceeding is an inquiry into and proposed rule-making for the prime time access rule, Section 73.658(k) of the Commission's Rules. Group W, by its Petition, seeks to expand the topics specified in the Notice.

2. The Petition for Modification states that the Notice designates only two topics for special consideration in the oral argument: The impact of the prime time access rule on U.S. program production activity and employment (including the extent to which such impact is a relevant consideration for the Commission); and data as to the number and types of syndicated and local programs which are likely to be aired on stations during the 1973-74 broadcast year and in the future. While the Notice doesn't specifically limit the topics to be considered in the oral argument, Group W argues that the designation of these two issues as topics of special concern is bound to discourage full discussion of other, more important topics. Group W asks the Commission to expand the topics now specified in the Notice as topics for special consideration in both oral argument and in fur-

ther written comment to include two additional subjects. These are: (1) The effect that repeal of the rule would have on the Commission's efforts to reestablish licensee individuality and responsibility as operable factors in television broadcasting. (2) If the rule is repealed, what alternatives should be considered to deal with the effects of network domination which were found to exist in Docket No. 12782.

DISCUSSION AND CONCLUSIONS

3. Upon consideration of this submission we are of the view that this is an unnecessary petition and should be denied. In paragraph 3 of the Notice of Oral Argument we said "[t]he Commission is not specifying the subjects to which discussion is to be limited. *We call attention to* two areas which we *hope* will be covered." (emphasis added) The Notice then mentioned the two areas which Group W says we are limiting ourselves to. Again, in the same paragraph, we further stated "the Commission in its decision herein is free to consider, and parties may wish to discuss, a wide range of alternatives, from leaving the rule essentially *as is* with minor changes, to repeal, and of course including various 'in-between' approaches." Thus, the Notice is by no means as limiting as maintained by Group W. In addition, the above quoted portions of the Notice invite discussion on the very areas into which the Group W Petition would now have us expand.

4. In view of the foregoing, the "Petition for Modification of Issues Specified in Notice of Oral Argument" filed on June 26, 1973 by Westinghouse Broadcasting Company, Inc. (Group W) seeking expansion of the topics specified in the Commission's "Notice of Oral Argument", IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

41 F.C.C. 2d

BEFORE THE F.C.C. 73-742

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, SECTION 73.658 (k) OF THE COMMISSION'S RULES	Docket No. 19622 RM-1967 RM-1935 RM-1940 RM-1929

Petitions of
NATIONAL BROADCASTING CO., INC. (NBC)
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)
KINGSTIP COMMUNICATIONS, INC. (KHFI-TV, AUSTIN, TEX.)
(For Deletion of the Rule)
MCA, INC.
(To Permit the Use of "Off-Network" Material Plus 25 Percent New Material)

MEMORANDUM OPINION AND ORDER

(Adopted July 6, 1973; Released July 10, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE AND HOOKS DISSENTING.

1. The Commission here considers a "Motion to Postpone Oral Argument", filed on June 29, 1973 by American Broadcasting Companies, Inc. (ABC). The Commission issued a Notice of Oral Argument, FCC 73-657, June 18, 1973, which set the above captioned proceeding for oral argument July 30 and 31, 1973 and the date for filing written material of July 13, 1973. This proceeding is an inquiry into a proposed rule-making for the prime time access rule. Section 73.658(k) of the Commission's Rules. By its motion, ABC asks that the oral argument and the related date for filing of written material, be postponed until September 17, 1973 or as soon thereafter as may be convenient for the Commission.

2. ABC sets forth six reasons why the argument and additional comments should be postponed. (1) With regard to the request stated in the Notice of Oral Argument for information regarding programming for the Fall, 1973, ABC understands that in some instances it is not available. (2) The matter of the prime time access rule's impact upon the U.S. program production industry is a new area of focus, and a reasonable postponement would be helpful for the development of data. (3) Two parties to the proceeding, Westinghouse Broadcasting Company, Inc. (Group W) and the National Association of Independent Television Producers (NAITP), have filed petitions for modification or clarification of the Notice of Oral Argument, and the Commis-

sion should act upon these petitions before the written comments are due. (4) Commissioner Johnson's term expired on June 30, 1973, and it is unclear whether he will continue to serve or will leave the Commission. ABC contends that due to the importance of this proceeding the issues therein should be considered and resolved by a full Commission, and that this is not currently possible. (5) The Commission is seeking the participation of principals as well as lawyers; yet the argument has been scheduled for the week of July 30, which coincides with the heart of the summer vacation period, thus making it inconvenient for many principals to participate. (6) A postponement will result in no significant delay of the resolution of this proceeding, as the Commission has indicated that it will not reach a decision before September.

DISCUSSION AND CONCLUSIONS

3. Upon consideration of this motion we are of the view that it should be denied. The bases upon which the motion by ABC rests are not sufficient for this proceeding to be delayed any further. We recognized in the Notice of Oral Argument that the programming data sought was that which was "predictable". With regard to the "new" information to be generated as to the impact of the prime time access rule upon the U.S. program production industry, the parties will have had more than a month to prepare by the time of the oral argument, which should be a sufficient amount of time. The two petitions by Group W and by NAITP will have been acted upon by the time written comments are due. With regard to the consideration of the prime time access rule question by a full Commission, and the uncertain status of Commissioner Johnson, we should not cease functioning merely because we are only six in number or because one Commissioner is uncertain about his future plans. The fact that the argument occurs in the heart of vacation time is not a valid consideration to delay the final outcome of this entire proceeding, which has been under consideration since October 30, 1972.[1] Finally, to delay the oral argument and further written submissions beyond those scheduled would adversely affect those parties which have already made arrangements for the dates stated in the Notice of Oral Argument.

4. In view of the foregoing, the "Motion to Postpone Oral Argument" filed on June 29, 1973 by the American Broadcasting Companies, Inc. (ABC), seeking postponement of oral argument and of the date for filing additional comments, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[1] Notice of Inquiry and Notice of Rule Making, FCC 72-957, 37 FCC 2d 900, released October 30, 1972.

F.C.C. 73-752

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE, SECTION 73.658(k) OF THE COMMISSION'S RULES	
Petitions of	
NATIONAL BROADCASTING CO., INC. (NBC)	Docket No. 19622
MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.)	RM-1967
KINGSTIP COMMUNICATIONS, INC. (KHFI-TV, AUSTIN, TEX.)	RM-1935
For deletion of the rule	RM-1940
MCA, INC. To permit the use of "off-network" material plus 25% new material	RM-1929

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1973; Released July 16, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Clarification and Modification of Issues" filed June 28, 1973 by the National Association of Independent Television Producers (NAITP). The Commission issued a Notice of Oral Argument, FCC 73-657, June 18, 1973, which set the above captioned proceeding for oral argument on July 30 and 31, 1973. This proceeding is an inquiry into and proposed rule-making for the prime time access rule, Section 73.658(k) of the Commission's Rules. By its petition, NAITP requests that the Commission conform the issues stated in the Notice to those recited in the Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 19622 [1] which instituted this proceeding.

2. The Petition for "Modification and Clarification" states that the Notice of Oral Argument points to two issues which the Commission is particularly eager to receive argument: (1) The impact of the prime time access rule on U.S. program production and employment; (2) the programs which are likely to be shown on stations during the access period in 1973-74. This, NAITP argues, is improper for four reasons. It is contrary to basic fairness and penalizes parties who have already responded by written comment in the proceedings thus far. It is contrary to the Commission's own definition of the relevant issues in this

[1] FCC 72-957, 37 FCC 2d 900, released October 30, 1972.

proceeding as set forth in the Notice of October 30, 1972. It improperly includes issues which pertain to taste and program judgment of television broadcasters which are not designed to elicit information regarding the operation of the prime time access rule. Finally, NAITP argues that the Notice improperly includes issues which are irrelevant to this proceeding and beyond the Commission's authority to consider.

3. The NAITP petition asks that a further notice of oral argument be issued which clarifies the two issues stated and expands the scope of the oral argument. NAITP asks that the issue of impact upon the program production industry be either removed or reframed so as to comport with Commission jurisdiction, which is stated to be the "larger and more effective use of radio in the public interest."[2] NAITP also asks that the issue of program data from the access period be reframed to include available programming as well as that actually scheduled. Finally, NAITP requests that we issue a new order which specifies all of the issues to be covered in the oral argument, which should include all those matters stated as areas of inquiry in the Notice of October 30, 1972.

DISCUSSION AND CONCLUSIONS

4. Upon consideration, we are of the view that this petition should be denied. The Notice of Oral Argument does not limit argument to the two areas specified by NAITP, i.e., impact upon the production industry and programming in the access period. Paragraph 3 of the Notice states: "The Commission is not specifying the subjects to which discussion is to be limited. We *call attention* to two areas which we *hope* will be covered." (Emphasis added). To say that this language limits the scope of the oral argument is, at best, erroneous, and the arguments made by NAITP against the alleged limitation of issues are without foundation. The petition also states that the Commission may not properly inquire into the areas of impact on employment in the program production industry as this is beyond our jurisdiction. The Notice clearly states that "[c]omments are invited as to what extent this is a consideration relevant to our evaluation of the rule—." Thus, this area is a subject for contention in the additional comments and the oral argument. Finally, NAITP misconstrues what is sought in regard to programming. We are not dealing with matters of taste or judgment on the part of broadcasters; rather, the Commission is concerned with how the prime time access rule is operating in terms of number and types of syndicated and local programs (U.S. and foreign-produced) which are likely to be shown in the predictable future.

5. In view of the foregoing, the "Petition for Clarification and Modification of Issues" filed on June 28, 1973 by the National Association of Independent Television Producers (NAITP), seeking modification and expansion of topics specified in the Commission's Notice of Oral Argument, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[2] 47 U.S.C. § 303(g).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 73-785
01596

In the Matter of

Consideration of the operation of, and possible changes in, the prime time access rule, Section 73.658(k) of the Commission's Rules	)	Docket No. 19622
	)	RM-1967
	)	RM-1935
	)	RM-1940
	)	RM-1929

PROCEDURE FOR ORAL ARGUMENT JULY 30 and 31, 1973

Adopted: July 20, 1973 Released: July 24, 1973

By the Commission: Commissioners Robert E. Lee, Johnson and Wiley absent.

1. Oral argument in the above-captioned proceeding will take place beginning at 9:30 a.m., July 30, 1973, in the Commission Meeting Room, 1919 M Street, N.W., Washington, D.C. (Room 856) and continuing on that day and the following day.

2. The parties on the attached list, having indicated their wish to participate in the oral argument, will be heard in the order stated, with the allotted time listed opposite each name. Since the request for time from 41 parties totalled more than twice the amount of time which could be scheduled in two days, we have of necessity granted less time than requested, except in a few cases where the request was for 10 or (one case) 20 minutes. The schedule is designed to permit all of the 41 parties to be heard for at least 10 minutes, to provide an equitable balance among the proponents and opponents, and to permit reasonable opportunity for the presentation of the various positions while avoiding unduly repetitious presentations by parties having essentially the same interest in this matter, as well as taking into account the time requested.

3. In two cases, parties appearing to have the same general interest in this proceeding have been grouped, without allotment of time to each individual party within the group. These are six independent producers scheduled for Monday morning, and four film production companies scheduled for Monday afternoon. Parties in each of these groups may divide the allotted time as they wish; other parties not so grouped in the list may of course agree on a similar pooling and redistribution if they believe it appropriate.

4. In arranging the schedule, we have endeavored to provide for a "mix" of contrasting views as the argument proceeds, with each morning and each afternoon session containing both proponents and opponents of the prime time access rule. It is hoped that parties in their discussions will address themselves, to some extent at least, to the arguments which have been advanced earlier.

5. If it appears that pertinent material would be developed, the Commission reserves the right to recall participants in the argument for further discussion, Wednesday, August 1, 1973, if possible, otherwise on a date shortly thereafter. This procedure was stated in the Notice of Oral Argument, FCC 73-657, released June 18, 1973.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Acting Secretary

Attachment A

MONDAY, July 30, 1973

Approximate Schedule	Participant	Minutes Allotted
9:30	National Association of Independent Television Producers	30
10:00	National Committee of Independent Television Producers	45
10:45	Joseph Cates, Pierre Cosette, Gregg Garrison, Burt Rosen, Burt Sugarman, Nick Vanoff	60
11:45	Viacom International, Inc.	10
11:55	Worldvision Enterprises, Inc.	10
12:05	Hughes Sports Network, Inc.	10
12:15	Tomorrow Entertainment, Inc.	20
2:00	Action for Children's Television	10
2:10	MCA, Inc. Paramount Pictures Corporation Screen Gems Warner Bros., Inc.	90
3:40	MGM Television	20
4:00	Twentieth Century - Fox Television	10
4:10	Metromedia Producers Corporation	25

Attachment B

TUESDAY, July 31, 1973

Approximate Schedule	Participant	Minutes Allotted
9:30	Screen Actors Guild Film and Television Coordinating Committee Hollywood AFL-Film Council	20
9:50	National Conference of Motion Picture and Television Unions	20
10:10	American Federation of Television and Radio Artists	10
10:20	Columbia Broadcasting System, Inc.	20
10:40	American Broadcasting Companies, Inc.	30
11:10	National Broadcasting Company, Inc.	20
11:30	Association of Independent Television Stations, Inc.	45
12:15	CBS Television Network Affiliates Asso.	10
12:25	The Wolper Organization	10
2:00	American Civil Liberties Union	10
2:10	National Citizens Committee for Broadcasting	10
2:20	Westinghouse Broadcasting Company, Inc.	25
2:45	Boston Broadcasters, Inc. WCVB-TV	10
2:55	Post-Newsweek Stations, Inc. WTOP-TV WPLG-TV WJXT	10
3:05	The Outlet Company WJAR-TV WDBO-TV KSAT-TV WNYS-TV	10
3:15	Wometco Enterprises, Inc. WTVJ	10

continued

Attachment B continued

3:25	WBRE-TV, Inc.	10
3:35	Adam Young, Inc.	10
3:45	New York City-Rand Institute	15
4:00	Cleveland Amory	15
4:15	Robert R. Nathan Associates, Inc.	10

PUBLIC NOTICE

Federal Communications Commission ¤ 1919 M Street, NW. ¤ Washington, D.C. 20554

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12121

November 29, 1973 - B

COMMISSION ISSUES STAFF INSTRUCTIONS IN PRIME-TIME ACCESS PROCEEDING

The Commission today instructed its staff to prepare a decision in the prime-time access rule proceeding, Docket 19622, amending Section 73.658(k) in the following respects:

1. There will be no restrictions on the programing of stations subject to the rule (network affiliated stations in the top-50 markets) during the period 7 p.m. to 7:30 p.m. ET and PT, 6 p.m. to 6:30 p.m. CT and MT.

2. With respect to the remainder of prime-time, the only restriction relates to the hours from 7:30 to 8 p.m. ET and PT, and 6:30 to 7 p.m. CT and MT, Monday through Saturday:

> "Prime-time programing requirements: Each commercial network affiliated station in the top-50 television markets shall devote a reasonable amount of prime-time programing each week, Monday through Saturday, but not less than six half-hours between 7:30 and 8 p.m. ET and PT, 6:30 and 7 p.m. CT and MT, to programs which are not network, off-network, or feature film; provided, however, that not more than one of these six half-hours may consist of children's specials, documentaries, or public affairs programing which is either network-originated or off-network."

It will be expected that stations subject to the rule will use some portion of the prime-time access period for minority affairs programs, children's programs, and programs directed to the needs and problems of the stations' community and coverage area as indicated by the community ascertainment process.

The Commission expects to issue its final decision before the end of the year.

-FCC-

NEWS

Federal Communications Commission
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Public Notice

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16746

Report No. 9117

ACTION IN DOCKET CASE

January 24, 1974 - B

PRIME TIME RULE EASED BY FCC

The prime time access rule, adopted by the FCC in 1970, has been amended by the Commission to relax its restrictions to some extent. The prime time rule, as originally adopted, limited network affiliates in the top 50 TV markets to a maximum of three hours of network programing during prime time (7-11 p.m. E.T.), and provided that the prime time "cleared" of network programs may not be filled with "off network" material. (Docket 19622)

The Commission said it had reached a decision which appeared to represent a balance of "competing demands for access or for exclusive access."

The new rule becomes effective in September 1974, for each network's owned and affiliated stations at whatever date the network specifies as the start of its new season.

The rule amendments (Section 73.658(k)) make the following general changes:

--All restrictions are removed (effective in September) from the present first half-hour of prime time, 7-7:30 p.m. E.T. and P.T., 6-6:30 p.m. C.T. and M.T.

--There are no restrictions on Sundays. This will permit the networks, if they choose to do so, to present up to four hours of programing on Sunday evenings.

--The period to be "cleared" of network and off-network programs is the second half-hour of prime time, 7:30-8 p.m. E.T. and P.T., 6:30-7 p.m. C.T. and M.T., Monday through Saturday. Network and off-network material may not be shown during these periods but one period each week may be used for network or off-network programs which are children's "specials", documentaries or public affairs programs. "Documentary" is defined as "any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants." (The rule up to now has not specified a particular time period as "cleared" time, but in practice, for network origination and for the great majority of stations subject to the rule, the 7:30-8 p.m. E.T. period has generally been "cleared" time Mondays through Saturdays.)

--Feature film (both made-for-television and made-for-theatre) is barred entirely from the cleared 7:30-8 p.m., half-hours.

--Allowance is made for sports runovers and time zone differences in the case of Pacific and Mountain time zone stations, where "simultaneous" network programing is involved.

--Exemptions in the rule for network coverage of special news events and political broadcasts have been liberalized to permit special news programs "related" to specific events as well as on-the-spot coverage, and to allow broadcasts "on behalf of" as well as "by" political candidates.

While not specified in the rule, the Commission stated that it expects stations subject to the rule to devote an appropriate portion of the "cleared" half hours each week to "material designed for children, material of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community..."

The Commission said that it had removed restrictions from the first half-hour of prime time because the Monday-Friday use of this period by top-50 market affiliates represented "singularly little in the way of opportunity for the development of really new syndicated material." The Commission noted that this was true before the rule -- when this was "station time" not used by the networks -- and has continued to be true since. Maintaining the rule's requirements with respect to the first half-hour would, the Commission said, be a "restraint without sufficient justification."

In retaining restrictions on the second half-hour, the Commission said it was important to preserve substantial "cleared" time for the development of local programing efforts and at the same time to preserve considerable potential for the development of first-run syndicated programing.

The Commission noted that it was tying the "cleared" time to the 7:30-8 p.m. period in "the interest of certainty and stability" to let networks and stations know what time will or will not be available for general use and to provide independent producers with a specific time-period and particular audience to aim at.

"Runovers" of network sports events beginning in the late afternoon, will not be considered "network programing" if the event was reasonably scheduled to end in normal course on or before 7 p.m. E.T. The Commission said that while no rule can completely eliminate runovers, the amendment will minimize them and afford a higher degree of protection to the 7:30-8 "cleared" periods than currently exists with respect to the 7 p.m. period. The removal of any restrictions on the first half-hour will also contribute to resolution of this problem. As to time-zone-difference situations, the rule provides that for stations in the Mountain and Pacific time zones, broadcasts of "live" network material, sports and special events presented simultaneously throughout the U.S. would not be considered "network programing" if the network's schedule for that evening complied with the rule in the Eastern and Central time zones. The new rule also provides that where a network devotes all or substantially all of its prime time on an evening to an international sports event, New Year's Day football bowl games, or other material of a special nature, other than sports or movies, this will not be considered "network programing" for the purpose of the rule and the 7:30-8 p.m. period. The same consideration applies to up to five "pre-game shows" per network each year in connection with sports events.

In order to avoid the need for "temporary" adjustments lasting only a few weeks (and which have been subject of waiver requests in the past), the Commission has provided an effective date "between September 1 and October 1 which the station's primary network designates as the start of the fall season." Generally, the Commission noted, this will be a Monday. The Commission said it had selected an effective date eight months away to permit all parties "to make plans and preparations in light of the fairly small changes which have been adopted." The Commission said that until September, current rules will continue to be administered as they have been, with waivers under the same circumstances which have hitherto been found to justify them. The Commission said that the somewhat more liberal provisions adopted would remove future requirements for waivers to permit the showing of particular "off-network" programs. With the liberalization of provisions for network special news programing, the Commission indicated that further extension of the present "one-time" news and public affairs waiver, beyond the September 1974 date to which it was being extended might not be warranted.

The prime time access rule, which had been adopted in May 1970 (Docket 12782), became effective October 1, 1971. The rule restricted to three hours the amount of network programing affiliates in the top 50 TV markets could present during the hours of 7-11 p.m. On October 1, 1972, Section 73.658(k)(3) of the rules became effective. It provided that the time from which network programing is excluded may not be filled with off-network programs or feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market.

Action by the Commission January 23, 1974, by Report and Order. Commissioners Lee and Hooks with Commissioner Wiley concurring and Commissioners Burch (Chairman), and Reid concurring and issuing statements.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 74-80

08022

In the Matter of

Consideration of the operation of, and possible changes in, the "prime time access rule", Section 73.658(k) of the Commission's Rules	)	
Petitions of:	)	Docket No. 19622
National Broadcasting Company, Inc. (NBC)	)	RM-1967
Midland Television Corporation (KMTC, Springfield, Missouri)	)	RM-1935
Kingstip Communications, Inc. (KHFI-TV, Austin, Texas)	)	RM-1940
(for deletion of the rule)	)	RM-1929
MCA, Inc.	)	
(to permit use of "off-network" material plus 25% new material)	)	

REPORT AND ORDER

Adopted: January 23, 1974; Released: February 6, 1974

By the Commission: Chairman Burch issuing a separate statement; Commissioners Reid and Wiley concurring and issuing statements.

Introduction

1. This proceeding -- a general exploration of the "prime time access rule" (Section 73.658(k) of our Rules), whether it should be retained or rescinded, what modifications should be made in it if retained, and (in the Inquiry portion of the proceeding) possible extensions of its scope and application -- was begun by Notice of Inquiry and Notice of Proposed Rule Making adopted October 26, 1972 (FCC 72-957, released October 30, 1972, 37 F.R. 23349, 37 FCC 2d 900). 1/ After various extensions of time, initial comments and reply comments were filed by January 15 and March 12, 1973 respectively, and after

1/ Section 73.658(k) has three sub-paragraphs. (1) sets forth the basic limitation: stations in the top 50 markets may not carry more than three hours of network programs during prime time each evening. (2) is an exemption for certain network news coverage and political broadcasts. (3) provides that the time cleared of network programs may not be filled with off-network programs, or feature films shown in the market within the last two years.

a Notice of Oral Argument issued June 18, 1973 (41 FCC 2d 519), oral argument was held in the proceeding on July 30 and July 31, before the Commission en banc.

2. A total of some 40 comments and 15 initial reply comments were filed through March 12, including filings by the three national television networks and ABC and CBS Affiliate groups, newly formed "independent producer" and independent station associations, seven "major" film production companies and other program producers filing individually, TV station licensees, union and professional groups in the program production industry, and other parties including the American Civil Liberties Union. A total of 54 persons, representing some 36 organizations or themselves, participated in the oral argument, including representatives of 20 entities which had not earlier in the proceeding participated. Some of these also filed formal comments after March.

3. As discussed hereinbelow, and spelled out in Appendix A hereto, Section 73.658(k) is amended in substance as follows:

(a) There are no more restrictions on the programs which stations subject to the rule (network outlets in the top 50 markets)may carry during what is now the first half-hour of prime time (7-730 p.m. E.T. and P.T., 6-6:30 p.m. C.T. and M.T.).

(b) The only other restrictions are as to the second-half hour of what is now the access period (7:30-8 p.m. E.T. and P.T., 6:30-7 p.m. C.T. and M.T.), Monday through Saturday. Stations subject to the rule must devote at least 5 of these half-hours to material which is not network, off-network or feature film, and must devote a sixth half-hour to such use unless it is devoted to network or off-network programs which are children's "specials" or documentary or public affairs programs (the latter are defined as any program which is non-fictional and educational or informational, but not including programs where the information is used basically as part of a contest among participants).

(c) Although not stated in the rule, it is expected that some of the five or six half-hours thus "cleared" of network, off-network and feature film material will be used by stations for programs relating to minority affairs, children's programs, or other programs directed to the needs and problems of the station's community and coverage area, as disclosed in its ascertainment process.

(d) The new rule also contains provisions relating to time-zone differences, and sports "runovers" to the small extent necessary now that there are no restrictions on the 7-7:30 p.m. period. It is also stated that the Commission will be much more stringent with respect to some types of waivers than it has been up to now.

I. Background of the Rule and General Description of the Comments

A. Background

4. The matter of "network dominance" in radio and later in television, and its various aspects, have been the subject of Commission concern since the 1930's, an early proceeding leading to the adoption of the "chain broadcasting rules" in 1941. The rules adopted at that time, pertaining to radio networks, are essentially those still applying in the AM and FM aural services (Sections 73.131-73.138 and 73.231-73.238). 2/ Shortly thereafter these rules were made applicable without substantial change to television, as several paragraphs of what is now Section 73.658, and various additions to the television regulations have been made since as that medium has become more and more important.

5. The regulation which later became the "prime time access rule" was originally proposed by Westinghouse Broadcasting Company, Inc. (Westinghouse), long a major multiple owner of TV stations as well as a producer and distributor of non-network TV programs, in the proceeding around 1960 concerning the restriction or prohibition in television of the "option time" practice (Docket 12859). Under this practice (which still obtains in radio), stations affiliated with national networks give their network an "option" on certain times of day (usually in their affiliation agreements) without the network's yet having scheduled a particular program during such hours. Westinghouse supported the retention of the three hours of evening option time previously permitted under the rule, but also urged that the networks be limited to that amount of prime-time broadcasting over their affiliated stations, thus freeing an hour of desirable evening "prime"time for non-network sources.

6. In the May 1963 decision of Docket 12859 prohibiting the time-optioning practice in television as an undesirable restraint on licensee programming judgments, the Commission refused to adopt the Westinghouse proposal, stating as follows (In the Matter of Amendment of Section 3.658(d) and (e) of the Commission's Rules and Regulations to Modify Option Time and the Station's Right to Reject Network Programs, 34 FCC 1103,1131):

> 68. All of these proposals, particularly those which would limit station access to network programing, involve a restraint on the licensee's freedom of choice with respect to programing his station. As mentioned

2/ These include rules as to exclusive affiliation, territorial exclusivity given stations by networks, term of affiliation, time optioning, retention by station of right to reject network programs, network ownership of stations, restrictions on dual network operation, and prohibition of network control over station rates for non-network time.

above, we are reluctant to impose such restraints, or permit their imposition, unless it is clear that they are required in the public interest. In deciding herein to prohibit option time or any arrangement having a similar restraining effect, we have acted to remove a major restraint which has long existed in the industry. Before considering further measures of a restraining nature, we believe it is appropriate to await developments with the industry simply operating without option time or similar arrangements. We do not say that the public interest would never be served by action along some of the lines just mentioned; if it so appears, of course such action will be considered. But for the present, with the major step taken herein, it would be premature to consider further measures until we have the benefit of observation of future developments.

69. In short, for the present we believe that programing in television should be left to free operation of the forces of competition, with programs from all sources obtaining exposure on their merits.

7. The 1965 proposal in Docket 12782. Docket 12782, the proceeding in which the prime-time rule and other restrictions on the three national networks were adopted in 1970, began in 1959 as an investigatory proceeding (an outgrowth of the general Network Study begun in 1955). The designating Order set forth the general area as "the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition", followed by more specific issues concerning network control over programming.

8. Following extensive hearings, in November 1962 the Office of Network Study reported to the Commission, concluding inter alia that network policies unduly restrict creative and economic competition in TV programming development, and substantially impede entry by independent program producers into network TV program markets; and that networks control the source of supply of programs and dominate competition in both network and syndication markets. On the basis of this report, in March 1965 the Commission issued a Notice of Proposed Rule Making in Docket 12782, proposing two types of restrictions on the three national networks:

(1) prohibition of their engaging in domestic syndication or sharing in the profits thereof, engaging in foreign syndication of any programs not wholly produced by the network, or acquiring any right, beyond that of network exhibition, in any program not wholly network-produced; and (2) limitation on tne amount of their evening entertainment schedules which the networks may fill with programs which they themselves own, to 50% of the 6 - 11 p.m. schedules excluding news. In other words, 50% of network evening schedules (except news) must be programs for which the licenses are held by other parties -- generally sponsoring advertisers or producers --.rather than programs owned and controlled by the networks.

9. Stating that the networks had progressively achieved "virtual domination of network program markets", the Notice stated the purpose of the proposed rules to be:

> (a) to provide opportunity for entry of more competitive elements into the market for television programs for network exhibition; and (b) to encourage the growth of alternate sources of television programs for both network and non-network exhibition (evening programs only).

Three main lines of development were specifically noted as contributing to the unsatisfactory situation:

(a) the near-elimination from network evening schedules of independently provided, advertiser-controlled programs, and their replacement by programs which, while the networks do not usually produce them themselves, are generally licensed to and controlled by them, both creatively and economically, with a view toward providing "bulk circulation" to appeal to "mass advertisers." 3/ Between 1957 and 1964, "independently provided" programs fell from 32.8 to 6.9% of network evening hours, while the total of network-produced and "network participation" programs rose from 67.2 to 93.1%

3/ It was recognized that this change involved many possible aspects: the network desire to maintain bulk circulation, increased production costs, and more sophisticated advertising and marketing techniques, including advertiser desire to cut risks by spreading expenditures over several programs on a "participation" basis rather than sponsoring a single program.

The comparatively small extent to which networks themselves produce entertainment programs, which actually declined between 1957 and 1964, was not regarded as particularly a problem.

(b) the concomitant practice of the networks' acquiring non-network interests or rights in the programs taken for network exhibition, such as sharing in the profits from the network run or later syndication, the entire right to distribute in syndication here or abroad, etc., to the substantial detriment of independent producers thus forced to give up these rights. 4/

(c) the expansion of the networks' role in domestic and foreign syndication, and, indeed, the growth of "off-network" programming, distributed both by them and by other syndication distributors, so as to constitute the bulk of syndicated material on which stations not network-affiliated must largely rely. This has become largely "off-network", and "the first-run syndication market appears to have virtually disappeared."

10. By way of tentative conclusions from these developments, the Commission observed that this concentration of control over the nation's TV programs appeared contrary to the public interest in several ways: the traditional public interest in diversification rather than concentration of control over the mass media; decreasing the competitive opportunities for independent program producers, who must deal with the networks on their own terms or give up hope of obtaining network access; and the needs of additional TV stations, particularly UHF stations, will require a vigorous independent syndication industry, whereas that industry has in fact shown a steady decline. As to the "50-50" part of the proposed rules, it was stated that this was designed "to place independent producers and network sponsors in a position to bargain on something approaching an even basis with network corporations in the program production process" and to "broaden the market to which an independent producer could take his wares and hence, foster and encourage competition among such producers ...". "The principle function of the proposed rule is to promote diversity of sources of network programs and thus to broaden the base from which such programs may be selected by network corporations for their schedules."

4/ It was stated that these developments together have the following results as to network programs: (a) concentration of economic, proprietary and creative control of program production and procurement in the networks; (2) concentration of residual rights in the networks; and (3) limiting the network-program market available to producers to the three network buyers, thus restricting the profitability of independent producer operations -- in sum, to centralize control of what is available to the American public and hamper the competitive development of "diverse and antagonistic sources."

11. The 1965 Notice also referred to the concept that strict adherence to principles of free competition might perhaps indicate that the networks should be barred entirely from the production and ownership of TV programs. It was stated that it did not appear that the public interest in a nationwide service would be furthered by eliminating the networks entirely from the production and procurement process; but, on the other hand, permitting existing network dominance to continue would likewise injure the public interest and act as a stricture on the "larger and more effective" use of television channels in the public interest.

12. The 1970 decision in Docket 12782. After the 1965 Notice of Proposed Rule Making, comments were filed until mid-1966, those of Westinghouse renewing the "Westinghouse proposal" which had not been adopted in the option-time decision. In September 1968, oral argument in the proceeding was ordered, specifically inviting comment on the Westinghouse proposal and also permitting parties to submit current data. Oral argument was finally held in July 1969; in May 1970 the Commission issues its decision (In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting (Docket 12782), 23 FCC 2d 382).

13. In this decision, the Commission adopted the"syndication" and "financial interest" rules substantially as proposed in 1965 (new Section 73.658(j)), and, instead of the proposed "50-50" rule, the Westinghouse proposal to limit the amount of permissible network prime-time programming each evening. With respect to the "50-50" proposal, it was stated (par. 4 of the decision) that the Commission was not persuaded that it was unworkable or would have adverse consequences (as various parties had urged), but rather that it would achieve the desired purpose without untoward side effects. However, we also noted ABC's contention that it would be harmed by the proposal vis-a-vis the other two networks (since advertisers had in the past tried to use other networks because of their more complete U.S. coverage), and that the Westinghouse proposal would be a more direct way of opening up time outside the network "funnel" for non-network sources. Accordingly, the latter was adopted, the "50-50" proposal being held in abeyance for the time being to see if the other approach would achieve the intended purpose.

14. The decision set forth "reasonably simple and ... quite compelling" facts and considerations leading to adoption of the rules mentioned. These included: (1) the great importance of the national networks in U.S. television, in terms of the percentage of stations which are affiliated and the small amount of non-network programs presented during evening hours (most of it "off-network"), the decrease (1958-1968) of first-run syndicated evening programming and the increase in "off-network", on independent and affiliated stations alike; (2) the virtual disappearance of advertisers

themselves as customers for programs, meaning that all would-be program suppliers have to deal with three customers, and all -- even well-established suppliers and the "major" film producers -- have had to give up subsidiary interests in their programs to the networks (in 1968, the amount of "independently provided" programs in evening network schedules had declined to 3.3%, from 6.9% in 1964); (3) the fact that a healthy syndication industry requires an adequate basis of stations to use its product, but it faces the "insurmountable advantage" which the networks have in dealing with their affiliates, with semi-permanent affiliation relationships and a much simpler distribution process -- an advantage "inherent in the distribution process and not in the product"; (4) Changes in advertising and marketing techniques, so that, instead of former individual or alternate sponsorship, 90% of evening network time is sold on a "participating" basis with advertisers simply buying commercial minutes or half-minutes in various programs; (5) network control of the production process "from idea through exhibition", which applies to network programs and, through the use of "off-network" material, the bulk of non-network material as well; (6) use of this control to achieve large circulation -- and therefore get advertisers interested in "low cost per thousand" figures -- at the expense of program diversity (which, to the extent it is present with books, plays and motion pictures, is simply impossible in the network system); and (7) greatly increased network activity in the non-network distribution of programs (syndication) or profit shares therein, with a close relationship between the programs selected for network exhibition and those in which the networks acquired these and similar interests. See decision, pars. 6-20, 23 FCC 2d 385-393.

15. The total situation was described as unhealthy in several respects, with complete and excessive control in the networks, working against the diversity of approach which would likely prevail if producers could develop shows for both network and syndicated distribution; and with independent producers unable to get access to large evening audiences for first-run syndicated material and hence unable to develop programs for use by new UHF and other independent stations. Therefore, the public interest requires a "limitation on network control and an increase in the opportunity for the development of truly independent sources of prime time programming" by opening up a half-hour of prime time each night. This could not be permitted to be filled with off-network material; "to permit this would destroy the essential purpose of the rule to open the market to first-run syndicated programming". The same was true of the use of feature film.

The Commission expressed the view that this "modest action" would provide an impetus to the development of independent program sources, and thus an increased supply of programs, for independent as well as affiliated stations (thus benefitting UHF), as well as increased local programing. It was stated that it may be hoped that diversity of program ideas would increase also. As to the reasons advanced in the 1963 option time decision for not adopting the Westinghouse proposal, it was stated that the record since shows that the prohibition of that practice has not improved the network-control problem, so that the Westinghouse proposal is appropriate for adoption now even though the Commission did not do so before. See pars. 21-23 of decision, 23 FCC 2d 394-396.

16. With respect to the argument of a number of parties that the rule would simply not result in programming from non-network sources comparable in character to that of the networks which it would replace, it was stated that while there was a conflict in the record, the Commission found no compelling reason why such programming should not be forthcoming from independent producers. With respect to arguments concerning the very high production costs of such material, it was stated that advertisers may be expected to pay what they have to in order to reach such large prime-time audiences; and that, while this question cannot be determined with absolute certainty in the absence of operating experience, the chance of success is sufficiently great that the opportunity should be made available to independent production. If the rule fails to achieve its purpose, it can readily be changed or rescinded. (Par. 24, 23 FCC 2d 396-397).

17. It was emphasized that the Commission did not intend to "carve out a competition-free enclave for syndicators", nor to smooth their path nor promote the production of any particular type of program. "The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers." In other words, the objective is "to provide opportunity -- now lacking in television -- for the competitive development of alternate sources of television programs so that licensees can exercise something more than a nominal choice in selecting the programs they present" ... and "to make available an hour of top-rated evening time for competition among present and potential non-network program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in diverse broadcasting service may be promoted". See pars. 24-26, 23 FCC 2d 396-397. At the end of the decision (par.37), in connection chiefly with the use of "independently provided" programs in network schedules, the Commission also stated that "Diversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee's

discharge of his duty as 'trustee' for the public in the operation of his channel." 5/

18. Chairman Burch issued a dissenting statement to this decision, joined in by one other Commissioner. His chief point was that, however laudable the motives of those Commissioners voting to adopt the rule, the economics of the situation simply preclude the development of comparable non-network programming for the "cleared" portion of prime time. Unlike the networks, independent suppliers cannot count on "selling" most of the top 50 markets, and the "fractionated top 50 market" simply will not sustain quality programming effort, in view of the very high present costs of program production. He also predicted little diversity, with more game shows and light entertainment, following "tried and true" lines, with the economics of the situation likely to dictate programming produced with reduced resources. As he saw it, harm would come to the public in the major markets, through loss of high-quality network programs without any real chance of replacement, to small-market stations and viewers because these markets can even less support expensive program efforts, and to independent stations (particularly UHF) because they will have to compete with VHF affiliates for non-network material to fill the vacated portions of prime time. He favored reliance on the promotion of other forms of television, such as subscription TV and cable, as the most promising approach to the "diversity" question. Along with Commissioner H. Rex Lee in a concurring statement, Chairman Burch also expressed dissatisfaction with the failure to afford a wider exemption to networks news and public-affairs broadcasts. Commissioner Lee also said in his statement that if the networks actually cut back their prime-time schedules "across the board" to three hours a night -- as they said they would and later did -- this would be definitely contrary to the public interest and the Commission should consider remedial action. See 23 FCC 2d 411-16, 428-29. 6/

5/ In summarizing this decision, and the later decision on reconsideration issued August 7, 1970, discussed below, we have not included the discussion relating particularly to the "syndication" and "financial interest" rules which are not involved here. We have also not included the detailed discussion in this decision of the "50-50" proposal (Appendix II)

6/ Former Commissioner Cox also had a concurring statement. See 23 FCC 2d 416-428.

19. The August 1970 decision on reconsideration. Numerous parties sought reconsideration of the May 1970 decision in Docket 12782; these were disposed of in a Memorandum Opinion and Order issued August 7, 1970, generally affirming the rule (25 FCC 2d 318). As to the basic substance of the prime-time access rule, this decision dealt chiefly with two lines of argument: (1) the character of the programming which would result, and (2) the possible impact on small-market affiliated stations if the networks cut back their prime-time programming throughout the country to 3 hours a night, as they did. As to the first, the decision noted that this was the subject of conflicting predictions in the record (as noted above), and that a number of independent producers had come forward since the May decision, expressing hopes and plans for the production of prime-time material. The same conclusion reached before was affirmed. See 25 FCC 2d 325-326. One aspect of the matter noted was the benefit from the rule to local and regional advertisers, who again have opportunity to buy time in, or even sponsor completely, syndicated prime-time programs, whereas they cannot afford to participate in national network programs. As to the small-market impact, the decision analyzed in some detail the potential costs and revenues to these stations if the networks reduced their schedules. It was concluded that the only small-market stations which might be seriously affected are the 58 with annual revenues of less than $1,000,000, of which 33 reported losses in 1969. These might lose income in amounts ranging from zero to about $44,000 a year. The decision concluded that this should not be enough to cause the demise of any of these stations, though it could affect their local and other non-network programming; and that, in view of the small amount of the nation served by these stations (3% for the 58 stations, 1½% by the 33 stations), "we consider the disadvantage occasioned these few stations to be outweighed by the public interest benefits in a more diverse and competitive broadcast market." (25 FCC 2d 329)

20. One other aspect of this matter noted was the high degree of dependence which these station licensees appear to have on the networks, if a half-hour reduction in network schedules causes them such concern. It was stated (25 FCC 2d 329-330):

> ... This confirms our conclusion that our television broadcast structure is over-centralized and poses a serious question as to whether the basic concept of a competitive, locally responsible television structure as envisioned by Congress and this Commission is being implemented. One principal objective of our Prime Time Access Rule is to lessen the degree of network domination of station operation. The stations in effect are pleading this domination as an element essential to their economic viability.

> If, as many licensees say in their letters and petitions, affiliates at present are so dependent on national networks that their economic viability and their ability to serve the public interest turn on whether they continue to receive revenues from an additional half-hour of network programming, they clearly are not in a position to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships. [Footnote 26 omitted] The present degree of network dominance of television broadcasting, now so graphically confirmed by the letters and petitions filed on reconsideration herein, emphasizes the need for Commission action to improve the situation. and to seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting. 7/

21. "Off-network" and "feature film" restrictions in the rule. Section 73.658(k)(3) of the rule contains restrictions on the programming which top-50 market affiliated stations may use to fill the time from which network programs are excluded: "off-network" programs or "feature films ". As noted in paragraph 15 above, these were adopted along with the basic three-hour limitation, in order to preserve the "cleared" time for access by non-network sources of first run syndicated programming. 8/ As originally adopted in May 1970, the restriction ran against "off-network syndicated series programs" and "feature films previously broadcast in the market." These were both modified in the August 1970 decision on reconsideration mentioned above, to read in terms of "off-network programs" (without any exception thereto) and "feature films which within two years have been previously broadcast by a station in the market." The second change was designed to meet the arguments of some parties that it is difficult or impossible to tell, as a practical matter, whether a given feature film may have been run in the distant past by another station in the market;

7/ Chairman Burch dissented to this decision as he had to the May 1970 decision, emphasizing the likelihood of injury to these small-market affiliated stations. See 25 FCC 2d 337-8.

8/ These restrictions were not part of the original "Westinghouse proposal". In opposing petitions for reconsideration filed in June 1970, Westinghouse took the position that these restrictions are not absolutely necessary to the operation of the rule in the public interest. It suggested as possible alternative approaches either a policy statement to the effect that the Commission hopes stations will fill the "cleared" time with new material, or limiting the "off-network" restriction to only the half-hour of time which actually represents a cutback in network programming (7:30 - 8 p.m. E.T.).

accordingly, the previous showing which serves as a bar is only one within the last two years. See 25 FCC 2d 334. At the same time, the effective date of these restrictions was moved back to October 1, 1972, a year after the October 1, 1971 effective date of the basic three-hour limitation on network programs, in order to permit stations to use during prime time, for a year, the off-network programs and feature films already contracted for.

22. These restrictions, particularly that concerning "feature film", have been the subject of two Commission public notices since the rule went into effect, issued in April and November 1972 (FCC 72-305 and FCC 72-1032 respectively). In these, it was ruled that: (1) the "off-network" restriction applies to "special" programs run on a network though not on a regular basis, but does not apply to material which is a continuation of a network series but which itself has not been shown on a network; (2) these restrictions do not apply to independent stations; (3) the "feature film" two-year restriction does apply to the station in the market which showed the film the previous time; (4) pending consideration in the general rule-making proceeding, the Commission will not take action against licensees which construe "feature films" as including and applying to movies previously shown on a network (which may thus be shown in "cleared" prime time two years after their previous network showing, whereas, if these were regarded as "off-network" programs, they would be barred permanently from use during "cleared" prime time).

23. Network news and public affairs programs. Section 73.653(k)(2) of the rule, as adopted in May 1970 and affirmed in August 1970, contains an exemption for network programs which are "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office." This area gave concern to some Commissioners, as to whether a broader exemption should not be adopted, to encourage presentation of this important kind of material. Since the rule became effective in October 1971, there has been in effect a waiver, sought chiefly by CBS, under which there is also an exclusion of "one-time" network news and public affairs programs, those not part of a regular series, even though they are not "on the spot coverage", etc. so as to fall under the exemption. See 32 FCC 2d 55 (October 6, 1971), 37 FCC 2d 570 (October 11,1972), and 42 FCC 2d 615 (August 29,1973). One of the issues in the present proceeding is what approach in this area should be adopted for the future.

24. General waiver has also been granted in another area, which was delineated in "Footnote 36" of the May 1970 decision (23 FCC 2d 395). This is where stations present a half-hour of network news in the early evening along with an hour of local news or public affairs material. It was recognized that they could comply with the rule by presenting first a half-hour of local news, then the network news before prime time (at 6:30 E.T.), and then another half-hour of local news at 7; but there seemed no reason to force stations arbitrarily to this "bracketing" format, so that they should be permitted to present the network news at 7 under these conditions, if desired, without its counting against the permissible three hours of network prime-time programming. This matter is also at issue in the present proceeding.

25. Other developments after August 1970. Other developments since August 1970 should be noted:

(a) Judicial affirmance. The rule received judicial affirmance on May 3, 1971, in Mount Mansfield Television, Inc. v. FCC, 442 F. 2d 470 (C.A. 2). Thus, the basic prime time access rule (which had not been stayed) went into effect October 1, 1971, some five months later, and the "off-network" and "feature film" restrictions went into effect October 1, 1972.

(b) Network schedules under the rule. As they had indicated they would, the networks cut back their prime-time programming "across the board" to three hours a night when the rule became effective in October 1971. The rule does not specify any particular hour of prime time which is to be "cleared" of network programs, but in practice it has generally been the first hour, 7 - 8 p.m. E.T. and P.T., 6 - 7 p.m. C.T. and M.T. In a letter of March 12, 1971, to the three networks, the Commission noted that they were apparently considering either 7:30 - 10:30 or 8 - 11 p.m. (E.T.) as the network portion of prime time, and expressed a preference for 8 - 11. This was based on what individual stations had indicated as to their plans for carrying non-network material, and also other considerations such as the impact on the Central zone from an earlier hour (7:30 E.T. would be 6:30 C.T.). In the first year under the rule -- September 1971 - September 1972 -- the networks' schedules were somewhat irregular, in light of waivers granted to NBC and ABC discussed below. Since then, the hours have been much more regular: 8 - 11 p.m. E.T. for all networks Monday-Saturday and, on Sunday 7:30 - 10:30 p.m. E.T. for all networks this year and for CBS and ABC last year (for ABC on Sunday in 1972-73 the hours were 8-11).

(c) Waivers looking toward a "21 hours a week" standard. In February and March 1971, the Commission granted waivers of the rule to NBC and ABC, respectively, to continue to program 3-1/2 hours during prime time on one evening, provided

the network and its affiliates cut back on another evening. See 27 FCC 2d 647 and 905. The NBC request was to continue its traditional Sunday programming including the Disney program at 7:30; ABC wanted to continue its strong Tuesday evening lineup. NBC cut back its programming accordingly to 2-1/2 hours on Friday, and ABC cut back first on Wednesday and later on Monday. Commission grant was based largely on the fact that 1971-72 would be a "transitional" year under the rule anyhow, with stations free to present off-network material during "cleared" prime time. A similar request by ABC for 1972-73 was denied in March 1972 (33 FCC 2d 1038), in view of the fact that the "transitional" period would no longer be involved, and the importance of making prime time available to non-network sources on a regular basis. Thus, while the Commission in effect adopted to some extent a "21 hours a week" instead of a "three hours a night" standard for 1971-72, it refused to do so for the future as far as network scheduling is concerned. The latter approach has generally also been taken with respect to individual stations seeking permission to exceed three hours of network material during prime time on one evening each week (using a delayed program from another night) and reduce correspondingly on another evening. However, in a few cases where special circumstances were involved, such as preemption of network material for a sports event on one or two evenings, with request to "make up" some of the network programming later, such waiver has been granted.

(d) Other waivers. Numerous waiver requests have been made, and usually granted, in some other areas: (1) waivers to accommodate possible sports "runovers", where the telecast as scheduled on the network should be over before prime time (e.g., a football game starting at 3:45 p.m. E.T.) but unexpected delays might cause it to run over into prime time; 9/ (2) special events including evening sports events and also programs such as NBC's Academy Awards and Miss America presentations, where simultaneous broadcasting throughout the U.S. is involved and this presents problems in the West because of time-zone differences (it has been held that in these cases if the schedule complies with the rule in the Eastern and Central zones, waiver will be granted for the rest of the country; see 33 FCC 2d 743); (3) other waivers to take into account the particular problems of the Mountain time zone, where there is usually no regular network "feed" at a particular hour to be used for broadcast when received (these have been largely eliminated by our action of June 1972 re-designating 6 - 10 p.m. as prime time in that zone); (4) waivers of the "off-network" restrictions of the rule to permit stations to carry certain material which has previously been on the network but was independently produced and controlled, without it counting toward the permissible three hours

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9/ "Footnote 35" of the May 1970 decision (23 FCC 2d 395) indicated that waivers would be granted under these circumstances.

of network and off-network material. Waiver was granted in three such cases (involving the Wild Kingdom, National Geographic and Six Wives of Henry VIII programs) and denied for the Lassie program. See 33 FCC 2d 583, 35 FCC 2d 758 and 773, and 37 FCC 2d 933. This has been one of the most controversial areas which has arisen in application of the rule.10/

B. Brief description of material filed in Docket 19622

26. Forty initial comments, totalling slightly over 1,200 pages, were filed in response to the Notice of Inquiry and of Proposed Rule Making herein. By over-all number, the majority, 24, expressed opposition to the prime time access rule and urged its repeal. These included the comments of CBS and NBC (later NBC changed its position at the oral argument); five "major" film production companies (MCA, Inc., Warner Brothers and Screen Gems Division of Columbia Pictures Corp., all filing lengthy comments, and shorter comments from Twentieth Century-Fox and Paramount), ABC and CBS affiliate groups, two smaller producers or syndicators (QM Production and Wrather Corporation), comments filed jointly by Screen Actors Guild and three other Hollywood labor or professional groups, 10 comments from other station licensees (including 16 licensee interests totalling 28 stations, all of them affiliated and 17 in the top 50 markets) 11/ and two from smaller Hollywood interests. Fourteen comments supported the rule, including those of ABC, the National Association of Independent Television Producers (NAITP), the Association of Independent TV Stations, Inc. (INTV), Metromedia, Inc. and Westinghouse Broadcasting Company, Inc. (both of them large multiple owners as well as TV program suppliers), three other producers or syndicators, five other station licensees (totalling 8 stations including 5 top 50-market affiliates, two affiliates in smaller markets, and one large-market independent UHF), and the American Civil Liberties Union. Two parties took no basic

10/ Mention should also be made of the denial of waiver to ABC to present 3-1/2 hours of Summer Olympic coverage on 10 week nights in August and September, which aroused considerable opposition. See 35 FCC 2d 340 and 765.

11/ Of the large multiple TV owners other than the networks filing comments herein (those with more than two stations), Westinghouse, Metromedia and General Electric Broadcasting Co. (GEBCO) supported the rule; Corinthian and Newhouse opposed it. At the oral argument, representatives of two other groups (Post-Newsweek and The Outlet Co.) and of one station owned by a third (Cowles) expressed general support for the rule, although some urged changes such as abolishing the "off-network" restriction. The term "licensee" as used in this summary counts as one licensee -- two or more subsidiary companies of a common parent.

position as to the rule although they sought modifications of it: The Wolper Organization, Inc., a well-known producer of documentary programs 12/, and the licensee of Station WHTN-TV, Huntington, W.Va. The commenting parties are listed in Appendix B hereto.

27. Fifteen formal reply comments were filed, 12 by parties filing previously (6 proponents of the rule, 5 opponents and Wolper), and three by parties participating for the first time. The latter included comments by two producers of "documentary" material supporting the Wolper position, and joint comments from MGM and United Artists taking no basic position as to the rule but urging considerable relaxation of the "feature film" restriction.

28. At the oral argument, the parties who had filed comments early in the year took essentially the same positions as before, except for NBC (see par. 33 below). Of some 16 parties basically new at this stage, 8 supported the rule at least in its basic element, the limitation on network programing (3 licensees; Worldvision Enterprises,Inc., a syndicator; Viacom Internatic nal, Inc., a producer for networks and syndicator; Action for Children's Television; National Citizens Committee for Broadcasting; and Adam Young, Inc., a national representative). Seven opposed the rule: National Committee of Independent Television Producers (a newly formed group of producers who work mostly with the networks); National Conference of Motion Picture and Television Unions (along with other union groups who had previously filed); Hughes Sports Network, Inc. (suggesting as more beneficial a "forced preemption" rule); Tomorrow Television, Inc., a producer for the networks and syndicator; and individuals Cleveland Amory (TV critic), Bernard Gifford (New York City-Rand Institute, though appearing for himself) and Clarence Jones, publisher of the New York City Black periodical Amsterdam News. One party, Robert R. Nathan Associates, Inc., took no basic position. Viacom, Worldvision and the National Committee of Independent Television Producers also filed comments in June 1973.

12/ Wolper urges either an exemption from the rule for network programs of "educational value" (documentaries, etc., such as those made by Wolper) independently produced, or, if the rule is repealed, adoption of a rule requiring the networks to present a certain amount of such material. See Section III, below.

II Main lines of argument against and for the basic rule and concerning the off-network and "feature film" restrictions.

29. In the next several pages there are summarized the basic arguments against and for the basic rule, and then concerning the "off-network" and"feature film" restrictions. The arguments against and for the rule, which are often in direct conflict, are set forth in parallel columns. The arguments against are set forth first because the arguments for the rule are,in substantial part, responses to criticisms and charges which have been made against the rule since before its adoption; and these are better understood in light of the opposing comments filed herein, which repeat and expand the same lines of opposition to the rule.

30. In the following discussion of principal arguments, only enough factual data is set forth to indicate what the arguments really are about. More detailed factual data and specific arguments are contained in Appendices C and D to this Report and Order, referred to in the discussion below.

31. Most of the discussion is based on the 12 longer comments filed: among the opponents, CBS, NBC, CBS Affiliates, three "majors" -- film producers MCA, Inc., Warner Brothers and Screen Gems Division of Columbia Pictures -- and Peninsula Broadcasting Corporation (WVEC-TV, Hampton-Norfolk, Virginia); and, among the proponents of the basic rule, National Association of Independent Television Producers,Inc. (NAITP), Association of Independent Stations,Inc. (INTV), ABC, Metromedia, and Westinghouse. Shorter comments referred to herein include among the opponents the joint comments of Screen Actors Guild and three other Hollywood labor or professional groups (herein "SAG et al" or "the Guilds") mentioned particularly in connection with asserted effect of the rule on U.S. program production; and, among the proponents, GEBCO, the American Civil Liberties Union (ACLU), and (particularly as to "game shows") Goodson-Todman Productions. Not all of the parties on either side make all of the arguments mentioned; for example, among the opponents, the "majors" urge that the rule has worked to increase, rather than diminish, network dominance, a point naturally not urged by any of the networks. However, in general, the arguments made by parties in various categories on each side are sufficiently similar so that they can be dealt with together. Reference is also made to significant oral argument material.

32. A. OUTLINE OF ARGUMENTS AGAINST AND FOR THE RULE.

AGAINST	FOR
1. The Rule as a "restraint" on licensee freedom in programming and on free speech and expression.	
(a) The rule is an improper restraint on licensee freedom in programing and on freedom of speech and expression, contrary to the regulatory scheme set up in the Communications Act and to the Constitution.	(a) The restraint involved is minimal (since it applies only to one hour a day on certain stations and thus does not really preclude any program) and is necessary to reduce inordinate network control and open up valuable time to independent sources of new material. Its propriety has been affirmed beyond argument in the Mount Mansfield decision; and, in any event, the present proceeding is a narrow one, to look at the operation of the rule in light of its stated objectives, and is no place for such philosophical arguments or "ponderous debate on established first principles". NAITP claims that the rule cannot be abandoned for reasons not related to its stated objectives such as philosophical arguments of this sort.
2. Whether the rule has had an adequate test at this point.	
(a) The rule has had an adequate test and there is no reason to believe that results under it in the future would be better than the poor showing so far, considering: (1) the fact that while off-network material could be used in 1971-72, in fact it filled only 22.6% of access time, so that there has been a two-year test; (2) the pattern -- extensive use of game shows (often "stripped"), other network-spawned material, and foreign productions, with only a small increase in local programs -- has been set, and in fact was more pronounced in 1972-73 than the previous year (less local, more game shows); (3) the alleged "uncertainty" was not really a factor; it did not deter Westinghouse	(a) The rule cannot conceivably be viewed as having had an adequate test at this point, because of (1) basic uncertainty as to whether there would be a rule at all until May 1971 (the Mount Mansfield decision), which left Westinghouse, Metromedia, etc. only 5 months to produce material for the first year; (2) continuing uncertainty as to the future, in view of talk of repeal by the Commission and others, and repeated Commission "waivers" (permitting off-network material the first year, letting ABC and NBC juggle their schedules the first year, waivers for "off-network" programs such as Wild Kingdom, etc.), which inhibits producers from trying expensive or "innovative" programs and stations from trying to develop new program audiences rather

2. Whether the rule has had an adequate test at this point continued --

AGAINST	FOR
and Metromedia in 1971 but their efforts were total failure; (4) the traditional station preference for "tried and true" material (plus inexpensive foreign product); (5) Reliance cannot be placed on statements of producers as to their plans, since experience shows these do not materialize; (6) rather, the programing on the proponents' stations (ABC et al, using stripped game shows, etc.) shows what is to be expected.	than short-run maximum profit from game shows and similar fare; (4) the traditional preference for the "tried and true", which can be overcome only with time (e.g., in the 1940's, the great majority of successful TV shows were adaptions of radio shows); (5) uncertainty at first, and even now, as to which part of the time would be "access time" and at what audience the producers should aim. It is claimed that, certainly, as to study of the rule's operation beyond its stated objectives -- where it has worked reasonably well -- this proceeding is premature.

3. The character of the access-period programming which has resulted. 13/

The character of access-period programing on the top-50-market affiliated stations is inferior to the programing previously presented, in diversity and in quality by any test-comparative production costs, audience acceptance (ratings), and critical acclaim, or lack of it. In particular: (a) Greatly increased use of game shows (up fourfold from 1970 to 1972, from about 8% to about 32% of access-period half-hours on these stations; and still higher in 1973-74 as shown in Appendix C).	Generally, these areas, particularly "quality", are not appropriate for Commission consideration, which makes the Commission a censor or "national program director", imposing overall national rather than locally attuned standards in a tyranny worse than the networks'. 14/ The rule is not properly chargeable with shortcomings not its fault, such as "wrong" programing decisions by the stations or the network cutback outside of the top 50 markets; and the Commission should adhere to its position, in the decision adopting the rule, that it is not designed to promote any particular type or cost-level of programing. Moreover, the rule has

13/ The term "access period" where used herein generally means that portion of prime time "cleared" of network and off-network programs in practice under the rule. As used by the major film producers in their "Joint Appendix" and later filings, it means the hours so cleared in 1972-73, which were 7-8 p.m.E.T. and P.T. (6 p.m. C.T. and M.T.) Monday through Saturday, and for ABC affiliates on Sunday; and, on Sunday for CBS and NBC affiliates, 7-7:30 and 10:30-11 p.m. This year, ABC also follows that schedule on Sunday.

14/ The argument in the text is largely that of NAITP, a narrow view of the proceeding not shared by all the proponents. ABC mentions three arguments advanced against the rule -- impact on small-market stations, alleged audience decline and dearth of "quality" programs -- and states that "Although these three criticisms of the Rule are worthy of serious Commission consideration ...to whatever extent valid, they seem on the facts presented an acceptable price to achieve the objectives which the Commission found to require adoption of the rule.

3. The character of the access-period programing continued --

AGAINST

(b) Greatly increased use of "strip" programing, that presented 5 (or sometimes 6) nights a week, usually game shows (see Appendix C; actually, the number of "strips" is about the same as in 1970 for the 7-7:30 p.m. E.T. period, but much greater for the 7:30-8 p.m. segment).

(c) Nearly all U.S. material is "network derived", either continuations of U.S. network series such as Lawrence Welk and Hee Haw or game shows such as To Tell the Truth, or "sixth episodes" of current stripped network daytime game shows such as Hollywood Squares, or material more generally derived from former network shows.

(d) Greatly increased use of foreign-produced material, for example 75% of access-period dramatic programs (in terms of time devoted to them in 1972) were produced abroad, compared to virtually none in 1970. This percentage is even higher in 1973, with the demise of the U.S. Dr.Kildare program. Usually these shows are "off-foreign network", and can be sold here cheaply.

(e) Less diversity through a larger amount of time being devoted to a smaller number of programs. In 1970, the 23 network shows, wholly or partly during the access period, took 74% of entertainment time, whereas in 1972 the 25 top syndicated programs took more than 86%, five of them over 40%.

FOR

certainly not had an adequate test in these respects, and such inquiry improperly focuses on only one hour of the day, excluding all other time. Moreover, "quality" is a subjective matter and it would be impossible to find suitable objective standards to measure it. Cost is not appropriate; it is not closely related to quality or appeal, and this would penalize cost-effective producers in favor of less efficient entities. Audience acceptance is not suitable because, even if it showed any significant difference, this would emphasize "mass appeal" programs while penalizing the showing of programs of slightly less mass appeal but more completely meeting the needs and interests of particular groups or areas (Hee Haw is sighted as an example). A comparison with network programs is inappropriate, since one of the ultimate objectives of the rule is to provide different programs, and it would have to take into account numerous network failures and a spotty record in programing this difficult part of the evening, as well as the fact that the networks have been in the business for over 25 years compared to two years. More specifically:

(a) the rule has greatly increased the amount of first-run non-network material shown in prime time; ABC lists 58 syndicated programs in 1972 compared to 26 in 1970, and other parties list over 60 in 1972. ABC lists increases in numerous categories -- drama, mystery, adventure, science fiction, comedy, cartoon, musical-variety, "personality" and children's -- in addition to game shows and such programs as Lawrence Welk and Hee Haw (saved from extinction when their network runs were cancelled and now very popular),

3. The character of the access-period programing continued --

(f) The small amount of local programming which has resulted from the rule. While locally produced access-period programming has increased threefold (from 44 half-hours in 1970 to 135 in 1972, and 145 this year) it still is small in amount, less than one half-hour per station (some markets have none) and less than the time devoted to either one of the top two stripped game shows.

(g) The lack of relevance of access-period syndicated programing, which -- largely game shows and foreign product -- does not deal to a substantial extent with current American life and problems, and does not employ minority-group talent to anything like the extent of current network productions. According to producer Bud Yorkin, network programing is the best way to approach minority-group situations and problems, citing the extent of Black participation and interest in his Sanford and Son program.

(h) Commission inquiry into the nature of programing in general terms is appropriate, just as in renewal applications where program type classifications are used.

(i) Extensive use in small markets of "off-network" stripped material instead of former network programs. Dr. Kildare, Black Beauty, Lassie, George Kirby Hour and Golddiggers. It should be noted that none of the last five are still in production, though Lassie and perhaps others are still shown to some extent in access time. Some programs, such as Norman Corwin Presents and Story Theatre, were quite innovative even though not successful enough to continue. The increase in local programing is noted, and also programs particularly beneficial in presenting new minority-group and other talent such as George Kirby, or particularly relevant to American problems such as Black Omnibus. Westinghouse asserts that, to an increasing extent, stations are preempting other prime time (network programs) to present such material. Documentaries, rejected by networks, have gained exposure.

(b) "Game Shows", like all types of material, some are good and some not so good, but overall they are popular and a legitimate form of programing featuring "real" people and stories and as entitled to exposure and access as any other kind of programing. Moreover, they were a feature of network prime time schedules in the 1960's (Let's Make a Deal on ABC as late as the end of 1970) and still are extensively stripped on the networks in the daytime.

(c) "Stripping", to perhaps an excessive extent, is something which will pass with time; anyhow, the Commission can move against the practice as such if it believes it undesirable (by rule or close examination at renewal time).

AGAINST

3. The character of the access-period programing continued --

(j) The rule has prevented the network exhibition of much valuable material, including programs of value for minority groups. Of 217 pilots produced in 1972-73 and 1973-74 -- offered to the networks -- only 35 became regular series and 24 received partial exposure; 160 were shutout entirely. Network regular public affairs and "news documentary" programs have largely dropped from prime time.

FOR

(d) "Network quality" which is being compared is not always so high, as shown by critical reactions, numerous failures (all 7 of one network's new shows in 1971 failed to return in 1972), and some less than glorious material used by networks in recent years in this demographically mixed and difficult time-segment.

(e) The opponents use the term "network-derived" so broadly as to be meaningless, since this is characteristic of all programing (All in the Family spawned Maude, etc.). Rather the public interest is served by enabling Lawrence Welk and Hee Haw to continue even though no longer consistent with the networks' plans and ideas.

(f) It is ridiculous to claim greater "relevance" on the basis of network-program characters such as a domestic in Maude: rather, the greater relevance is in programs presenting new minority-group talent (Kirby), especially concerning minority problems (Black Omnibus), or local material concerning such problems and employing minority-group members as hosts and talent.

(g) Use of foreign material is justified as an "early weapon" against the entrenched networks; in any event, the networks have done so also (Metromedia lists 16 network series in the recent past -- The Saint, Tom Jones, etc.) plus perhaps 30% of the 1/3 of network prime time devoted to movies.

(h) If overall prime time is looked at, the programming picture is much more diverse, for example drama has increased overall in 1972 as compared to 1970.

3. The character of the access-period programing continued --

AGAINST

FOR

(i) One reason for the limited kinds of U.S.-produced material is that in general it must fit a half-hour segment. If a full hour were available, there would be more drama and similar material.

4. Level of commercial activity and benefit to non-national advertisers.

(a) With 4 to 6 minutes of commercials in syndicated programs as compared to 3 minutes in network programs (and a longer station break), the rule leads to over-commercialization, with the level of commercial activity up as much as 66%, in addition to numerous product "plugs" in game shows. While this may have resulted in increased opportunity for local and other non-national advertisers, it has been at the expense of turning the access period into a "commercial quagmire".

(a) The rule has significantly increased opportunities for local and other non-national advertisers by giving them access to valuable time for their messages even though they do not need, or cannot afford, the expensive network system, a source of concern to Government agencies and Congressional Committees in the past. The benefit accrues both to local advertisers getting spots in syndicated and locally produced programs, and to smaller national advertisers (e.g., a furniture company) who can choose programs suited to their needs and sponsor them in selected markets. Also, while syndicated programs may contain more commercials, this is governed by codes of practice, and some licensees (e.g., Westinghouse) have not raised their commercial level. While national advertising in prime time was up 23% in 1972 compared to 1970, local advertising was up 38%.

5. Effect on "independent production" 15/

(a) While the rule was designed to diversify the sources of prime time programs, it has had the opposite effect, with 43 producers represented in the access period

(a) The rule has had a sharp impetus on independent production for prime time, with some new entities, producers formerly working chiefly for the networks

15/ The term "independent producer" has never been precisely defined; one suggestion is that it should mean any producer when he is producing for non-network distribution, but not when he is producing for network use.

5. Effect on "independent production" continued --

AGAINST	FOR
in 1972 (syndicated programs) compared to 54 in 1970 (total of syndicated, off-network and network programs), and an even greater decline if only U.S. producers are counted. There have been no new entrants, virtually all of the present producers having been on television before and often with prime time material (including network "specials" and in some cases regular network series). There has been a benefit chiefly to a few game-show specialists and importers of foreign product.	who are now in independent production, and other independents expanding their activities -- developments which will increase with time and the certainty of the rule's continuance. ABC puts the number of first-run syndicated producers in prime time in 1972 at 43, compared to 21 in 1970. The same opportunity is there for the "majors" and others if they choose to enter the field. Producers are also benefitted by having much more freedom to display creativity in ideas and production, rather than having to conform to the ideas and supervision of 3 network program executives. Local programing and advertiser-developed programs are also said to represent healthy development of sources independent of the networks.
(b) Moreover, other equally "independent" producers in the sense that they are not associated with networks (including the "majors", Tandem Productions, QM, etc.) have been seriously hurt by being foreclosed from access to a substantial portion of prime time, since they rely on the network process for obtaining exposure for their quality product. It is claimed that the non-network producers have sought and secured not the "right to compete" but freedom from legitimate competition.	

6. Effect on U.S. program production; "impact on Hollywood".
(See Appendix D for detailed facts and arguments)

(a) By eliminating 12 hours (24 half-hours) of network-programmed prime time each week, the rule has had a very serious impact on U.S. program production activity (particularly in Hollywood)	(a) This argument is not relevant; it is not up to the TV industry or the Commission to guarantee the welfare of Hollywood (the Department of Justice indicated a similar view in its filing in one of our proceedings).

6. Effect on U.S. program production; "impact on Hollywood" continued --

AGAINST

and employment in it. The gross loss is computed to be in the order of $60 million total, or about $53 million annually in payroll for talent, technicians, etc. (24 half-hour program slots, times 24 original episodes each year on the average, times $100 thousand per episodes) representing 16,000 production jobs. This loss is made up only in small part by syndicated program production because of its nature, game shows, foreign product, etc., and not by local activity in most cases, so that overall there is a loss of $25 million to $30 million. Unemployment rates in Hollywood are extremely high, 85% for Screen Actors Guild members and over 50% for some technician unions, as a result of this and other problems, endangering the "pool" of talent and skilled technicians necessary for a developing industry. Most other countries recognize the need to protect their TV industries, by quotas, subsidies, etc.; here, the U.S. is doing just the reverse by encouraging foreign competition, contrary to the national interest. The loss has required shelving numerous network programing projects which would have been of value to minorities and would have employed minority-group talent and technicians; the same is true with respect to situation comedies which are of interest to, and employ, women. The quality of access-period programs which have resulted is extremely poor (see above), and a few local successes should not obscure this. In sum, the decline in employment represents a decline in production values and therefore in program quality for the U.S. audience, contrary to the public interest and the national interest.

FOR

(b) This argument is essentially a myth, if employment all over the U.S., and not just in Hollywood, is considered, for example, the 14 people added to the staff of ABC's Chicago station to handle its expanded early evening news program. In general, there is bound to be more employment from more than 60 syndicated programs shown in the access period, combined with local increases, than in 23 network shows, particularly since the former have as good, or often a better, "new-repeat" ratio. While there doubtless are, and will be, "shifts" in employment, for example access-period variety shows employing musicians compared to "network-type" shows employing actors, and with respect to various parts of the country, overall there should be a gain rather than a loss.

(c) The analysis by the unions and "majors" ignores certain realities, such as the shift from film to tape production (which means AFTRA rather than SAG members as actors) and the rising amount of income derived from producing TV commercials.

(d) Conditions in Hollywood are improving -- unemployment was less in 1972 than in 1971, the "majors" showed, in most cases, better profit pictures, the number of Hollywood movie "starts" was up and foreign "runaway production" starts were down, and movie box-office receipts increased.

6. Effect on U.S. program production; impact on Hollywood" continued --

AGAINST

FOR

(e) To the extent that there is a problem, it is a complex one resulting from a number of factors, several of them resulting from extremely high production costs and obsolescent business practices (which some of the majors have acted recently to eliminate). ABC mentions padded costs and "feather-bedding". Some of the particular factors are increased TV re-runs, increased network prime-time use of made-for-theatre movies, "run-away production" and declining box office receipts ever since the 1940's.

7. Effect on "Network Control and Dominance".

(a) As to the objective of lessening network dominance, the rule has been definitely counter-productive, increasing this rather than lessening it. This is because the rule creates an artificial scarcity of network prime time by reducing it one-seventh (3-1/2 to 3 hours a night), and thus increases the network "lock" on the remaining three hours. Thus, since the three networks are in a dominant position both as sellers of advertising time (vis-a-vis several hundred potential national advertisers) and as buyers of programing (vis-a-vis more than a hundred producers), their control in both markets is increased. They are able to raise prices to advertisers considerably (the average price per prime commercial minute went from $50 thousand to $60 thousand in 2-1/2 years) and at the same time make little or no increases in the prices they pay producers for programs.

(a) "Network control" is obviously reduced by removing an hour of prime per night on 150 stations from the "network funnel" through which prime-time material would otherwise have to pass. As a result, the number of buyers of prime-time material has increased from 3 to 150, and, often for the first time, stations are making individual decisions as to prime time programing, as envisaged by the Communications Act. Having alternative potential buyers, producers are freed from network control, and from having to limit their ideas and conform the execution of these ideas, to what suits the plans and views of network program executives at the time.

7. Effect on "Network Control and Dominance" continued --

AGAINST

Moreover, they are increasing their dominance of other time, such as weekend late afternoons for sports and NBC's late late show, and, out of a sense of loyalty, affiliates have cut down their preemptions of network prime time programs.

(b) The network companies' control over programing is also exercised through their owned station purchases of access-period material. Since all network outlets in the top 3 markets are network-owned, each network also has two other stations in major markets so that overall it reaches about 23% of the U.S. through its owned stations, and the five stations usually buy syndicated material as a group, this means that it is highly important, if not indispensable, for a program supplier to make a deal with one of the network groups in order to have an economically viable product. Thus "network control" is very important even as to non-network material.

FOR

(b) "Network dominance" is still a serious problem, as indicated, for example, by the extent to which the amount of station time devoted to network programs has increased over the last 20 years (in the case of NBC, from about 44% of the typical broadcast day to about 74%), the extent to which it continues to increase as the networks expand their programing in other parts of the day, and circumstances such as the election campaign of 1972, when the networks were able to, on a number of occasions, clear time on affiliates during the "access period" for political broadcasts, rather than preempting their own programs during network prime time. The rule, in short, is only a small weapon in the struggle against this tendency, but at least it is something, and should clearly remain as long as the problem exists.

(c) Moreover, without the rule there would be increase in another kind of dominance, that of the "major" film production companies, who among them have more than 50% of network prime-time non-sports entertainment time in 1973-74, with MCA by itself having some 20%. The access period should remain clear from the programing of this limited number of sources.

AGAINST	FOR
8. "Audience Acceptance" (ratings) (7:30 - 8:00).	
(a) Audience ratings for the access period (7:30 - 8:00) were considerably less in 1971-72 than they were in earlier years when network programs were shown then. While this was not true in 1972-73 (when ratings were overall back to their earlier levels or slightly higher), it was still true in a few markets and, moreover, there was generally a shift in audience from network outlets to independent stations, harming the former. This shift results from the fact that the independents may, and do, present off-network material during this period, and this shows the basic inferiority of new access-period material, less attractive to audiences than either network or off-network programing.	(a) After dropping for the 1971-72 year, ratings during the access period have returned to their previous levels, or even higher. ABC refers also to an "audience preference survey" (TV-Q) which shows only slight differences between access shows and following network programs.
9. Effect on Stations.	
(a) All affiliated stations are harmed through the degradation in quality of the programing they are able to offer. This is particularly true of small-market stations, whose limited economic base does not enable them to generate enough advertising revenue to afford programing of reasonably good quality to replace the network programs lost.	(a) While impact on small-market stations (and others) was one of the strongest arguments against the rule in 1970, this has simply not materialized. Only one station (KROC-TV, Rochester, Minn.) specifically claimed economic hardship in its comments, and this was much too vague to meet the Notice's requirements in this respect so as to be probative. Affiliates in large markets, down to about the 75th, are better off under the rule, since they can keep all of their access-period revenues.

9. Effect on Stations continued --

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(b) As to economic consequences, affiliates in the large markets are making more money through getting all, rather than 30%, of the revenues from the access period; but these stations have always been quite profitable and do not need help. Medium-market stations are not affected either way, and smaller-market stations -- both those in the lower portion of the top 50, and those outside -- are seriously harmed, since they are not highly profitable in any event and must pay the cost of programing the time themselves, with limited revenue return if any. Also, some stations have been hurt economically through not being able to make full use of costly feature film packages they have purchased.

FOR

(b) Independent stations are greatly benefitted, both from the impetus to the production of more non-network material which they can use, and, of more immediate consequence, the fact that during these hours they may present popular off-network material which their competitors cannot, giving them an audience advantage. This is highly important, such stations now getting as much as 40% of their revenues from the 6-8 p.m. hour (and are able to use spots in the access period to sell other time in "packages"). Ratings have increased by 100% or often more. This is important to the survival and viability of some of these stations, and enables independents to engage in more extensive local efforts (including news and public affairs) and to buy desirable first-run syndicated material for other times.

10. Effect on the Networks.

(a) The networks had more net income in 1972, under the rule, than ever before, and should not be heard to complain against the rule. ABC and the cause of "inter-network competition" have particularly benefitted, with ABC having achieved approximate parity with the other two networks and in 1972 showing its first profit on network operations in 10 years. The reduction in network prime time, and the cost of programing it, came at a good moment, since in 1971 cigarette advertising was banned for the first time, and generally "soft" economic conditions prevailed.

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11. Effect of Repeal.

(a)Repeal of the rule would have a disastrous effect, both on individual independent producers who have made personal financial commitments to its success and continuation, and on the public interest. Repeal would cause some producers to cutback their operations by 50%, others to withdraw entirely, and would break the back of independent production for years to come, depriving the public,perhaps permanently, of the one real opportunity to receive fresh, imaginative programming. It would be worse than no rule at all, tending to establish a Commission view that the network way is the only way. It is inconceivable that repeal at such an early date should be considered seriously, when the rule was adopted after years of study and is clearly in furtherance of the antitrust tradition, and without the "safe period" on which independent producers and syndicators were entitled to rely.

12. The "Barter" Distribution System.

(a) The "Barter" system widely used with syndicated access period programing -- under which a national advertiser acquires a series or secures its production, and offers it to stations in return for part of the commercial positions in the program (no other payment) -- presents some problems and should not be encouraged. First, stations are often required to take the program in advance of production, without knowing much about it. Second, cancellation is difficult, because of problems of "making good", to the sponsor, the commercials in the remaining programs. Third, there are anti-competitive aspects -- these sponsors are often large national spot advertisers, and "tie" the purchase of spots on a station to station acceptance of the program.

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13. Whether the Networks "control" Producers or their Programs.

(a) No (producers Bud Yorkin and Lee Rich). The networks do not control what the independent producer, doing business with them, produces or how he produces it. Rather, the networks are simply one conduit by which the producer can gain exposure for his product on the nation's TV screens, first-run syndication being the other; and producers who choose the network route because of its advantages (cheaper and easier access) should not be barred from competition.

(a) Definitely yes, both as to basic program ideas which they will and will not accept, and in the production of a program, for example, ordering a scene of an episode to be shot and re-shot until they are satisfied (which adds to the costs; whether it adds to "production values" is a matter of individual judgment).

14. Whether Network or Syndicated Programing is more likely to be "new" or "innovative".

(a) Definitely network programing (producer Lee Rich) because only the networks have the fortitude, or resources, to start and continue a new type of program which is not immediately successful in gaining audience, advertisers and clearances, although later it may be a tremendous success (All in the Family, somewhat controversial at first, and The Waltons, a "gentle" show without violence, are cited as examples).

(a) Independent producers, who are freed from the need to tailor their ideas to obtain acceptance from one of three networks, and from control over the production process. Moreover, "independent" producers do not have the tremendous competitive stakes and investments which the networks do, and therefore are more free to experiment even though they may not always be successful.

15. Whether the Rule can result in Programing of Network-Comparable Quality and Diversity (See Appendix D for more detailed facts and arguments).

(a) No, because of the inherent advantages of the network system; what the Commission has tried to do is to achieve the impossible, having programing like that of the networks without using the network system. Dramatic program production is a very risky and high-cost business, with costs in the order of $100,000 per half-hour episode and $200,000

Definitely yes, because:

(a) Costs of production are less for first-run syndication than for network programing. Talent will work for less (e.g., the Hee Haw performers when that show went independent), producers are free to "shop around" for facilities at cheaper prices rather than use

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15. Whether the Rule can Result in Programing of Network-Comparable Quality(cont'd)

per hour episode, and several hundred thousand for a pilot, with only a small proportion of pilots becoming successful series. This is difficult with the network distribution process, and impossible without it (it was possible years ago, with much lower costs and before the networks had complete national inter-connected coverage, but those days are long gone). Essentially, there are three problems: (1) the "fractionated market", with many more syndicated programs than there are available slots on top-50-market affiliates; (2) the uncertainty; even if a program may ultimately be sold in nearly all the large markets, this will not be known in advance so the producer will know how much he can spend; (3) the inherently higher costs of syndicated distribution anyhow, with a "syndication fee" in the order of 30-35%, or the need for multiple sales efforts, and the cost of making and shipping multiple prints (said to be as much as $5,000 per program).

(b) It is also claimed that the syndication market cannot possibly produce revenues approaching $100,000 per episode; one estimate is that the syndication process could produce a

those of the networks at high prices (as producers for the networks are pressured to do), and the production need not be saddled with the high "overhead" characteristic of network and major-studio productions.

(b) Costs of distribution are considerably less than claimed by the opponents; for example, while Metromedia would charge a fee of 35% or so for syndicating someone else's production, it figures distribution costs on its own material (Primus and Dusty's Trail) at only about 10%, including the cost of some five salesmen.

(c) Syndicated programs draw more revenue than that claimed by the opponents; for example, Metromedia's Primus took in $63,000 per episode domestically and about $20,000 in overseas sales, even though it was a failure rating-wise (this resulted in a slight profit over production cost of $75,000), and the mid-1973 figures for its new Dusty's Trail program are about the same. Let's Make a Deal will have grossed $80,000 per episode.

(d) It is expected that stations will be willing to pay more than they do now for access-period material (estimated at often a sum equal to three 30-second spots) 16/, when the

16/ The total of the 30-second national spot rates in typical access-period programs for one station in each of the top 50 markets is just about $25,000. Assuming that eight 30-second spots are sold in each half-hour at the straight national rate without discounts, that each episode is used twice during a year, and that the program is sold in 40 of the 50 markets, representative as to size, the total per program revenue which a half-hour series would generate for the 40 stations would be $320,000 gross, or $272,000 after 15% agency commission.

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gross of no more than $58,000, or a net after commissions, etc. of $45,000, for two runs of a program. (However, see the proponents' data as to sums actually gained).

(c) Aside from the facts as to what might be possible, there is also the matter of what is likely to happen. Since a first-run syndicated program such as a 'network-quality" dramatic program is going to be expensive to produce, it will have to be priced rather high, and stations are not likely to want to pay that kind of money when they have obviously cheaper alternatives: (1) game shows, which cost $10,000 or less to produce, and many of which have a proven "track record" of audience appeal; or (2) foreign material, including dramatic shows, which can be sold cheaply in this country when it is "off-foreign network" and most or all of the production costs have already been recovered.

FOR

15. Whether the Rule can Result in Programing of Network-Comparable Quality (cont'd)

rule is given assurance for the future and the idea of quality access-period material becomes established.

(e) Independent producers for syndication do not expect to make a profit, or even break even the first year, on a program series, any more than producers for networks do on the network run. Rather, the hope is for the program to be successful, so that it continues in production and exhibition for four years, and the entire package of 104 or so episodes can then be sold on a "strip" basis. This is the big "killing" for the producer, which he hopes for whether it is a network or first-run syndicated program initially.

(f) Access period showing on stations subject to the rule is not the only source of revenue to producers; many programs are also used by additional stations in non-prime time, and by stations in other markets.

16. Performance in Light of the Commission's Stated Objectives.

(a) The rule has been a failure in terms of the Commission's objectives in adopting it. Network control and dominance has been increased rather than lessened, there are virtually no new sources of programs (and fewer producers in the access period than were there before) and the resulting programing lacks both diversity and quality.

(a) The rule has worked at least reasonably well in terms of the Commission's objectives. An important amount of valuable time has been freed from the network "funnel", there are many more producers of first-run syndicated prime-time programing than previously, and more such programs, including material of diversity and quality. Competitive conditions for producers are much improved with 150 instead of 3 customers for their product.

AGAINST	FOR
17. Benefits and Detriments.	
(a) The rule has harmed most of the components of the industry -- producers who seek to use the network route (the "majors" and many other producers); talent, technicians and their unions from the loss of activity in production of quality network programs; affiliated stations with respect to the quality and diversity of programing they are able to present and, in the smaller markets, economically as well; and the public through loss of good and diverse material during these hours.	(a) The rule has benefitted, or will benefit, most groups in the industry -- independent producers, probably, at least ultimately, talent and technicians through a greater number of prime time programs, affiliates in the majority of markets (without any significant harm to those in smaller markets), independent stations, the networks, and the public through getting a chance to see new and innovative material.

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33. NBC's position. Of the three networks, ABC has vigorously supported the rule, and CBS has opposed it (although in the final oral-argument stage its arguments were largely philosophical and it specifically asked that repeal not be effective until September 1975). NBC, originally and through early 1973 one of the most vigorous opponents of the rule, changed its position at the oral argument, and in a sense supported it. Its position was in substance that it had doubts about whether the rule was originally a good thing, but it was adopted, and extensive changes in the industry have resulted. It is questionable whether the status quo could really be restored in light of these changes; therefore the rule might as well be retained (with some adjustments of a fairly mechanical nature) and the controversy thus finally ended.

B. "OFF-NETWORK" AND "FEATURE FILM" RESTRICTIONS.

34. As mentioned in par. 21, above, Section 73.658(k)(3), as adopted in May and modified in August 1970, provides that the time cleared of network programs may not be filled with "off-network programs; or feature film which within 2 years prior to the date of broadcast have been previously broadcast by a station in the market." In practice, these restrictions and their application have been among the most troublesome areas of the rule, and the Notice beginning this proceeding proposed for consideration a number of modifications (see Notice, pars. 37-44 · 17/ With respect to the "off-network" provision generally, the proposals were mostly in the direction of liberalization; as to use of "feature film", proposals in both directions, toward a more liberal and a tighter rule, were put forward. A number of parties, on both sides of the basic question, commented on these matters. Their arguments are discussed at this point, since they are for the most part general in nature concerning some of the basic ideas involved, rather than the details of particular modifications.

35. General arguments in favor of the restrictions. Some of the proponents of the rule -- including NAITP, INTV, Metromedia and Westinghouse -- 18/ argue vigorously in favor of these restrictions and against any relaxation of them by waiver or over-all liberalization. Among the arguments advanced are:

17/ As to the "off-network" restriction, modification along four possible lines was proposed, in addition to continued ad hoc consideration but on a more orderly basis. The four (Notice, par. 37) were: (1) exemption for "short series", e.g., 6 or fewer episodes; (2) exempting packages consisting very largely of new material but with a few off-network episodes (e.g., Christmas-time "specials"of certain series); (3) providing that stations may present, either without limitation or up to a certain number of hours a year, off-network material which has not been on the network for some time (e.g., 5 years for the material itself and 2 years for the series); (4) the "MCA proposal", under which a series could be presented if it consisted of about 25% new material (an extension of the waiver granted to Wild Kingdom).

18/ ABC also opposes repeal or wholesale relaxation of the rule at this time, though it may be possible in the future, when new first-run syndicated material has become better established. It agrees with the other parties mentioned concerning the specific proposed modifications. GEBCO does not oppose relaxation of the rule in this respect.

(a) Relaxation is unnecessary because the rule does not preclude the broadcast of any program. A given off-network program may be shown outside of prime time or, by preemption, during the network portion of prime time; it may be shown at any time on independent stations (in 36 of the top 50 markets) and, of course, without any restriction outside of the top 50 markets. NAITP also suggests a way it can be presented by top 50 market affiliates during the access period: in the spring and summer, when the stations may run it and comply with the rule by substituting a first-run syndicated series for a network program, which by then will be all re-runs anyhow.

(b) The vital importance of the rule in stimulating the independent production of new material, and the harm to that objective which results from relaxation of the rule, in two ways: first, the impact on the amount of access-period time actually available to new material; and second, the uncertainty or potential harm to independent producers of material similar to that for which the rule is relaxed. It is said that development under the rule requires stability, not the possibility of relaxation which makes it a "floating crap game" or a "house of cards" likely to tumble around the ears of producers entering it.

(c) The additional importance of the rule in minimizing network control which would result from widespread use of former network material which had its origin in a system of high network dominance. This point is urged by NAITP but not much by other parties.

(d) Waivers of the "off-network restriction" -- and general relaxation also, if it involves concepts such as "fact v. fiction", "educational value", etc. -- involve subjective Commission quality judgments and are therefore inadmissible, as well as essentially irrelevant to the rule's objectives, which were concerned with a program's origin, not its nature. 19/ Metromedia asserts that the Commission's desire to permit the free presentation of off-network material "a cut above the average" is understandable; but it must resist the temptation in the interest of achieving the rule's objectives. NAITP asserts that this impermissible "quality" test is implicit even if not expressed, for example the "cost" of all-new production of the Wild Kingdom series, mentioned in the decision granting waiver, reflects essentially a Commission view

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19/ NAITP: "And quality of access shows is not a proper criterion for anything at all since the subject is one to be avoided. ... "Moreover, FTAR has nothing at all to do with what the affected programs are but only with how they were produced. Thus, since their nature has nothing to do with their original exclusion, there is no way in the world that their nature can be reason for lifting that exclusion."

that the program is too good to be lost. This is wrong, in view of the amount and variety of new material available. If a program is really so good, and the Commission believes this kind of evaluation is appropriate, NAITP asserts that the Commission should "bite the bullet" and make the networks run the material again.

(e) The various proposed "off-network" modifications (footnote 17, above) are all bad, in that they are unnecessary ((a) above) and would have an impact on prime-time availability. As to the possible "short series" exemption, it is said that there is no public-interest basis for distinguishing between these and longer series, that the Commission's judgment here too is probably a "qualitative" one, and that waiver for even one of these series, and certainly for more than one, would have a substantial impact on access time availability to new material. The proposal involving broadcast at a certain length of time after the program ran on the network is said simply to exclude current network shows to permit the showing of old network shows. The "MCA proposal" is more vigorously opposed, as being extremely harmful to sources of new material, and redounding only to the benefit of a few parties, such as the "majors", who have off-network packages. It is claimed that this would be highly damaging and unfair competition, in that such material could be offered at much less than an all-new package with its high production costs, has an established "track-record" which helps it competitively also, and represents an almost risk-free operation since the supplier (having most of the package in hand already) does not even have to start new production until success is assured.

(f) Relaxation or repeal of the "off-network" restriction would hurt the cause of program diversity (by making old material more widely useable) and decrease the total pool of programing by discouraging the production of new material -- in favor of material which is "neither new nor independent". Unemployment would thus be increased. NAITP claims that the prime-time rule without the "off-network" and "feature film" restrictions would be worse than no rule at all, for these reasons. It is also claimed that there would be no programming aimed particularly at specialized audience groups, since this is one of the chief absences in network programming and thus in off-network material.

(g) Independent stations will be hurt through not having the exclusive right to show off-network material in access time, as well as losing the other benefits of the rule through an increased supply of new material.

(h) There would be less of a process of educating audiences and stations to enjoy and use new first-run syndicated material.

(i) The rule would benefit only a few, at the expense of all other groups -- independent producers, independent stations and the public -- for reasons mentioned above.

(j) Waiver or relaxation would simply breed more similar requests. However, it is urged that any relaxation should be codified rather than ad hoc, so that parties involved can plan their activities.

36. General arguments against the "off-network" and "feature film" restrictions. The continuation of these restrictions, at least in anything like their present form, was opposed by a number of parties, including those opposed to the basic rule -- CBS and NBC, the "majors", the CBS and ABC affiliate groups, etc. (sometimes opposing these even more strongly than the basic rule) -- and some individual licensees who support the basic rule restricting network programming but opposing these additional limitations. These included the licensees of Boston and Wilkes-Barre-Scranton affiliates and of two stations outside the top 50 markets (both in Iowa). Much of the argument is along the same general lines already indicated, including: (1) the assertedly dismal quantity and diversity of the access-period material which has developed, and its lack of real "newness", which makes it ridiculous to deprive stations and the public of much more attractive off-network material; (2) the restriction on licensee freedom of choice, said to be in violation of the Constitution and the Communications Act, particularly since there is here no relation to reduction of "network control"; (3) the assertedly subjective and impermissible "quality judgments" which the Commission has had to make in applying the rule. The latter line of argument is basically the same as that of proponents of the rule; but these parties, such as CBS Affiliates, reach the opposite result: since the waiver process is impermissible, and since a "no-waiver" policy which would bar fine off-network material would be even worse, the only solution is to get rid of this restriction (even if not the basic rule).

37. The essence of the opponents' case is set forth in the comments of Boston Broadcasters, Inc., as follows:

> The principal objections to the prime time access rule have not been its limitation upon network offerings, but its attempt to regulate the content of the access period by proscribing off-network and feature film material from that period. These proscriptions were justified at the time of their adoption as useful means of

39. As noted above, one of the proposed modifications of the rule is the "MCA proposal", under which a package of off-network plus 25% new material could be shown without restriction in the access period. MCA no longer advances this, stating that it was advanced as an interim measure, to get relief for the 1972-73 season, and that, instead, the rule should be repealed entirely (or at least the off-network part of it). 20/ On the other hand, CBS Affiliates and some other parties claim that this relaxation would be a good thing in the absence of complete repeal -- the minimum the Commission must do to avoid complete absurdity. It is also claimed that this would not necessarily have a severe impact, since many older off-network series are out of production by now.

40. We also note a proposal advanced by the licensee of Station WHTN-TV, Charleston-Huntington, West Virginia, to the effect that the "off-network" restriction should be of only two years duration, similar to the "feature film" limitation now in the rule. It is claimed that this is to be preferred because there is little new material of good quality.

41. The "feature film" restriction. The general arguments above of course apply as well to the "feature film" restriction in Section 63.658(k)(3); but this subject also presents some particular aspects.

42. The August 1970 modification of the rules provides that stations may not fill the access period with "feature films" previously shown by a station in the market within the last two years. This, combined with the general "off-network" restriction in the same paragraph, appeared to some to create ambiguity as to whether a movie which previously ran on a network (either one made for television or one made originally for theatre use) is "off-network", permanently barred from the access period, or a "feature film" barred only for two years. In a Public Notice of November 1972, we took cognizance of this possible ambiguity and stated that, pending this overall reevaluation of the rule, stations subject to the rule may construe it to bar such "off-network" movies only for two years from their previous showing.

43. Aside from the semantic problem of what is a "feature film", the discussion of this subject in the Notice (pars. 41-44) and comments raises essentially the following issues:

20/ MCA suggests that some of the problems raised by the "off-network" restriction could be met by tightening the rule, to bar to the same extent material which is technically "new" but simply is a continuation of network material, and also material which is "off-foreign network". However, it states that this is really not practicable; there simply would be virtually no suitable programing left.

(a) Whether there should be any distinction in the rule among three categories of movies or "feature films" 21/ -- those made for theatre and distributed for TV only in syndication, those made for theatre originally but later shown on a network, and those "made for television" (which, at least up to now, means "made for network television").

(b) To the extent that the rule is to be based on a certain period after the previous network or non-network showing in the market, should the period of restriction be less than in the present rule (e.g., one year), or more (e.g., 5 years), or longer, or even permanent, with respect to reuse by the same station (which normally would have little difficulty in determining whether a film had been shown on it in the past)?

(c) With respect to any or all of the above categories, should there be no restriction at all, or, on the other hand (as urged by NAITP) a total ban on using previously shown movies during the access period (the original May 1970 provision) or even (as claimed by NAITP to be the most consistent with the rule's objectives, but not actually advanced as a proposal) a total ban on any use of movies during the access period, since they are not new material created for this TV use?

44. The proponents of tight restrictions in this area are the same as those mentioned above, particularly NAITP, INTV, Metromedia and Westinghouse, NAITP taking the firmest line. 22/ These parties claim generally that an off-network program is just that, whether it is a movie or something else, and should be barred from the access-period if the rule is to fulfill its objective of providing opportunity for sources of first-run material (syndicated or local). NAITP also makes the argument noted above concerning the importance of barring from access time material which has reflected network control; while it concedes that this is less applicable to "made for theatre" features, it asserts that they should

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21/ In the joint reply comments of MGM and United Artists, it is pointed out that the term "feature film" has been judicially defined so as to limit it to "made for theatre" material. U.S. v. Columbia Pictures Corp., 189 F. Supp. 153,157 (S.D.N.Y. 1960).

22/ ABC's position is that the present rule, with the liberal interpretation adopted in the November Public Notice, is satisfactory; anything is a compromise, and this is probably as good as any other. It is urged that there is no basis for distinguishing among the three types of features, that this material is popular and of high public interest, and that there should be no further restrictions.

be treated the same because of the inhibiting effect on the development of new material. NAITP, alone among these parties, asserts that even as to "made for theatre" features never shown on networks, the rule should impose a permanent ban against reuse in the market during the access period, the same as that originally adopted in May 1970 (the other parties mentioned apparently are reasonably well satisfied with the present two-year limitation as long as all movies shown on networks are permanently barred). 23/

45. In support of its position that the ban on re-use of any movies should be a permanent one, NAITP asserts that the two-year restriction is illogical and inconsistent with the purpose of the rule; that it encourages stations to re-run older movies rather than newer ones, and to preempt network movies for their own because they can re-use the latter but not the former; and that if stations really have a question about whether a movie has been shown in the market in the distant past -- the chief reason for modifying the permanent bar to a two-year restriction -- they can simply play new movies instead. In short, all movies previously shown on TV in the market, regardless of origin and of whether they were shown locally or on a network, should be forever barred from "cleared" prime time, at least unless the Commission can be sure that the use of such material will be highly limited in quantity. In rebuttal, NAITP urges some other points: (1) the welfare of the "majors"is not a legitimate concern of the Commission (even less than that of our own broadcast licensees; (2) no heed should be paid to stations who talk about "cheap" game shows and then want to use movies which -- not generally, but because they already have them -- are just as "cheap" to them; (3) any relaxation here, as with the "off-network" restriction generally, will hurt employment in the production industry by encouraging the use of already-produced material. Metromedia in its comments urges that any relaxation as to "off-network" material would create an extremely serious loophole, because lots of programs could be labelled "movies". INTV stresses the extent to which the "majors" and other film distributors still have a TV market -- independents, other times of the day, etc.

23/ NAITP in fact suggests that the objectives of the rule would be best served by a total ban on access-period use of movies, at least until some "made for syndication" are produced, since they do not represent new material created for the access period. However, it does not actually advance this suggestion.

46. The "feature film" restriction, at least in the form adopted in 1970, was vigorously opposed by several parties, including especially the "majors" -- particularly Warner Brothers, Screen Gems, MCA, and, in joint reply comments, MGM and United Artists -- and the licensees of two top-50 market affiliates which use movies in the access period, WTIC-TV, Hartford, Conn., and WVEC-TV, Hampton-Norfolk, Va. (Peninsula). The "majors" urge that the rule is an illegal restraint on freedom of speech and licensee freedom of choice, and also an improper and invalid distinction against this form of program -- which may represent material of extremely high appeal and quality -- in favor of technically "new" material which may be neither truly new nor of value (game shows, etc.), and which under the rule may be run an infinite number of times. It is also claimed that any distinctions between "made for theatre" and "made for TV" films, and those broadcast on a network initially vis-a-vis those distributed for TV only by syndication, are arbitrary and invalid; since the films shown on networks tend to be better, it is obviously contrary to the public interest to discriminate against them in favor of films otherwise reaching television. 24/ It is claimed by MGM and United Artists -- who are concerned particularly with "made for theatre" product -- that a restriction on "feature films" simply increases network dominance. The argument is that the good films will go to the networks, whereas in syndication a station can use the material only once every two years.

47. The majors also urge two other main lines of argument: (1) the 2-year restriction (or, indeed, any restriction) is contrary to other Commission policies; and (2) their serious economic problems, resulting in part from regulation. In connection with the first, it is said that in Docket 18179 the Commission has expressed the view that there are too much "exclusivity" and too long "rest periods" involved in the showing of feature films, and in the Pay TV area we have adopted rules to present the "siphoning" of feature films away from free television; but here we are restricting any repetition of a film for at least two years, thus making a two-year "rest" period mandatory and preventing the full use of the product on free television which we adopted the"anti-siphoning" rules to protect. The matter of appropriate "rest" periods between exposures, it is said, should be left to the licensee. Second, it is claimed that the majors badly need relief from a number of adverse economic developments: the general and severe decline in theatre attendance during the last 25 years; declining sales of films to the networks and to TV stations via syndication (the latter declined from $94 million in 1970 to $49 million in 1971); and the "whipsawing" effect of

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24/ In this respect as in some others, the proponents and opponents of a tight rule make a common objection, but reach opposite conclusions from it. NAITP claims that any discrimination between films on the basis of source or method of distribution is improper; therefore the ban on all should be permanent. The "majors", on the other hand, claim that there should be no restriction on any of them.

restrictions on cable and pay TV usage on the one hand, and free-television usage under the prime time access rule on the other. It is said that the rule operates to severely curtail the "after-market", thus complicating these problems; and that a healthy motion-picture industry is as important as a healthy first-run syndication industry which the rule was expressly designed to further. In sum, the majors claim, the rule is not good, and should be repealed; certainly it should not be extended beyond the August 1970 provisions as applied in the November Public Notice. It is also claimed that the rule is basically unnecessary; movies occupied only 4.5% of access-period time in 1972-73, and only 7.1% in 1971-72.

48. The two licensees mentioned raise some of the same and other points. Peninsula (WVEC-TV) raises the scheduling problem: to the extent that films are barred entirely from access time, it is often difficult to show them at all, 25/ and the station cannot recover the cost unless it can get two showings in access time (out of 5 showings in 5 years which is the customary basis on which film is licensed to stations). It is also claimed that it is simply ridiculous to bar from access time, and keep the public from seeing, a package which Peninsula is considering buying from MGM, of made-for-theatre material -- thus with no "network control" -- which ran on the network 5 or 6 years ago and thus would be largely new to the audience. It is claimed that it should be up to the licensee to decide what "rest" period is appropriate, and whether a package of this sort is desirable for early-evening use, and also that the rule hurts the station economically in that it cannot make full use of its inventory of 1,500 titles (an investment of $275,000). WTIC-TV, Hartford, the other station commenting on this point, urges that a permanent bar on network-shown movies is extremely restrictive in effect; there were some 549 titles available for purchase in the Hartford-New Haven market at the beginning of 1973, and of these, 397 or 72% were off-network. Even higher was the percentage of the movies the licensee regards as "suitable" for early-evening showing judging by the title; of 183 such films, 151 or 83% were off-network. 26/

25/ CBS Affiliates points out that a restriction on access-time usage means that a given movie -- e.g., one suitable for young viewers -- cannot start at 7:30, but must start after 8 p.m.

26/ We also note a suggestion by the licensee of Station WHTN-TV, Huntington, W.Va., that the present two-year restriction be modified so as to apply only as to previous showings in prime time. It is claimed that movies shown at other times reach largely different audiences so that they should be disregarded for this purpose.

III. Comment on Various other Rule-Making Proposals in the Notice.

49. There are discussed in this section the comments concerning various specific changes in the rule advanced in the Notice of Inquiry and Proposed Rule Making herein (other than "off-network" and "feature film" changes discussed above), and also two other proposals advanced in comments. In some cases, involving fairly simple and non-controversial matters, our conclusions are set forth.

A. Changes related to time in different locations ("daylight saving" and time-zone differences).

50. Daylight Saving Time - We are adopting herein, as set forth in Appendix A, the rather simple proposal set forth in the Notice herein (Notice, par. 32(a)) providing that where one of the "top 50 market" cities in the Eastern and Central time zones does not observe daylight saving time (e.g., Indianapolis), "prime time" in that market is an hour earlier, during the "daylight saving" portion of the year, than it would be otherwise. This proposal drew some support and no opposition in the comments. Two points should be noted: (1) we are adding a provision, in light of certain developments late this summer regarding Indianapolis, that where a station wishes to follow a general practice of delaying network programing an hour during this period, upon notification to the Commission, it may use the regular prime time hours for its time zone (e.g., 7-11 p.m. E.T. in Indianapolis); (2) We are not extending this rule to Phoenix, Arizona, the other large city not observing daylight time in 1973, as to which no comments were submitted, and where Mountain time is already two hours behind New York time even without this adjustment. If there are problems there, they can be handled by waiver. The general adoption of year-round daylight saving time recently may have rendered this a less significant matter, but it appears that at least one market (Indianapolis) will still be involved, and accordingly the change is adopted.

51. Time-zone differences. The Notice herein (par. 32(b), 33 and 34) invited comments on a possible change in the rule urged by NBC previously in our 1972 proceeding concerning prime hours in the Mountain time zone (Docket 19475), and also involved in a number of waiver requests by NBC and certain individual stations (e.g., Academy Awards and Miss America programs, 33 FCC 2d 987 (1972). NBC's proposal relates essentially to evenings when the network's programing includes special material, such as sports or special events such as the Academy Awards or Miss America pageant,

which is broadcast simultaneously throughout the 48 states (unlike most regular network programing, which is delayed in the West). It is designed to permit viewers in the Mountain and Pacific time zones to watch the same network programs as Eastern and Central time zone viewers on these evenings, for example by presenting after the special event, in the West, other network programs which have been shown before it in the East (e.g., the Academy Awards telecast begins at 10 p.m. E.T., and runs until shortly after midnight, and it has been preceded by two hours of regular NBC programs; the event starts at 7 p.m. P.T., and runs till shortly after 9 p.m. P.T., and NBC wants to present, in that area during the remainder of prime time, the same two hours of regular NBC material). 27/ NBC's proposal is that on evenings where there are such simultaneous telecasts, a schedule of network programing which complies with the rule in the East should also be regarded as complying in the West (if it includes only the network's evening programing for that day).

52. There was relatively little discussion of this in the comments, the only real opposition being that of INTV, opposing any waiver of this sort except where the network devotes its entire prime-time broadcasting in an evening to the same programing. Some of the proponents of the rule (ABC and Metromedia) expressed support for such relaxation in the Mountain time zone, whose two or three markets in the top 50 are not crucial to the rule's objectives. NBC advanced two general arguments in support of its proposal: (1) particularly in the Mountain zone, any restriction affects stations outside of the top 50 markets and not within the rule, since the stations in Denver, Salt Lake City, etc., feed programs to smaller-market stations; (2) in these Western zones, there is actually less network broadcasting than there is elsewhere on these days. It was claimed that in the absence of liberalization or waiver, these Western stations are going to have to forego these special events or cut them short, or forego the other, regular network material.

27/ A variation of this situation -- really a "sports runover" problem -- is where an event such as the World Series starts at 8 p.m. E.T., or 5 p.m. P.T., and runs until about 11 p.m. E.T. or 8 p.m. P.T. NBC has requested, and we have granted, waiver so that West Coast stations may "assume" the event runs only one hour into their prime time, and they may run two additional hours of "off-network" material. See 37 FCC 2d 110 (September 1972).

B. "21 Hours a Week"

53. Since the rule went into effect in October 1971, one of the complaints against it, and the source of a number of waiver requests, has been the alleged lack of "flexibility" entailed in the "three hours per night" limitation. It has been claimed that stations should be free to rearrange their schedules so as to present more than three hours of network or off-network material some nights, compensated by a cutback on other nights of the same week, so as to be governed in effect by a "21 hours a week" instead of a "3 hours a night" standard. After some actions early in 1971, the Commission has usually refused to permit such rearrangement on a regular basis, although it has been permitted in "one time" situations, such as "making up" network programs preempted on a particular evening for local sports. The Notice herein (pars. 29-31) invited comments on modification, either to a flat "21 hours a week" or various possible changes not going that far (deviations one or two nights a month, or regularly where necessary to clear for news plus an hour-long program, or 21 hours a week but continuing to present a half-hour of "eligible" material each night).

54. The flat "21 hours a week" concept drew little support and considerable opposition, from the staunch proponents of the rule, licensees, networks and others. It was feared that networks or individual stations (or both) would rearrange their schedules from time to time in such a way as to preclude the presentation of first-run material on a regular basis so as to build a regular audience. Thus, the networks could put all of their 21 hours on six nights, leaving a "junk night" for the presentation of the station's required non-network material, or at least juggle their "special" programs to achieve somewhat the same result. The networks, similarly, feared station rearrangement of network programs which would destroy "audience flow" and network ability to guarantee advertisers a particular time slot. CBS claimed that the only significant result would be an increase in use of local movies on certain nights; Metromedia said there would be enough "flexibility" to subvert the rule. The disadvantage of juxtaposing "access-period" programs on one station and network programs on others (to the detriment of the former) was also asserted, along with the uncertainty for independent producers as to what time period, and therefor what audience, they should produce for. In short, highly desirable certainty and stability would be impaired.

55. However, there was some support, particularly in reply comments, for partially moving in this direction, for example, permitting stations to present up to 3-1/2 hours of network or off-network material on two nights a week and to reduce to 2-1/2 hours on two other nights. NAITP suggested that this be permitted only for networks (not stations), only if they notify the stations long in advance, and only if all "cleared" time after 7:30 E.T. is contiguous. With this relaxation, it was said, there would be no excuse for waivers. Metromedia, while stating it saw no real need for change, suggested that the "long" network evenings be on weekdays, and that stations have an option of going to such an arrangement or following the present rule. ABC's reply comments were to the same general effect. It was claimed that this would give more flexibility to networks, stations and non-network sources, for example, permitting the "clearing" of an hour-long period after the news on some nights (said to be one of the limitations of present practice under the rule), and non-network program access to the larger after-8 audiences, and giving the networks a chance to start programs such as children's "specials" at a desirably early hour on other nights (this has been a source of substantial complaint under the rule).

C. Sports "runovers" and other sports waivers.

56. Paragraphs 35-56 of the Notice herein requested comments on the appropriate policy for the future with respect to waiver of exemption for "sports runovers" situations, which have given rise to numerous waiver requests, chiefly by the networks, which have generally been granted. These are situations -- chiefly late-afternoon network broadcasts on weekends or holidays -- when the event begins at an hour such as 4 p.m. E.T., and normally would be expected to conclude before the beginning of prime time at 7, but, if weather delays, overtime, etc., occur, may not conclude by the anticipated time. 28/ "Footnote 35" of the Report and Order adopting the rule (23 FCC 2d 382, 395) stated that waiver requests would be considered in such circumstances. Waiver is of course not necessary for complete coverage of the event itself, but to enable the network to carry it plus the regular three hours of prime time evening material later. The Notice advanced the following possibilities: (1) a required "roll-back" of evening schedules following such a runover, so as to leave a full hour for non-network material during prime time (e.g., if the sports event runs until 7:10 p.m. E.T., network evening programing could not start until 8:10 p.m.); (2) simply assuming that events of various types will last a certain length of time, and ignoring any

28/ Such "runovers" may also occur in connection with evening sports events, but in such cases the runover typically occurs outside of prime time, in the Eastern and Central zones, and therefore they fall into the category of time-zone difference situations already discussed.

runovers if the events as scheduled would normally be completed within that time (e.g., 3 hours for baseball and football, 2 hours 15 minutes for basketball); (3) requiring the networks, if there is such a "runover" by more than 5 minutes or 10 minutes, to "give back" a half-hour of time within the next few days; (4) granting a blanket exemption to certain events of great appeal such as the World Series, the Super Bowl, New Year's Day and other college bowl games, Olympic coverage, and possibly some, but few, others.

57. Most of the commenting parties favored either the status quo or the second proposal above, ignoring runovers if the scheduling has been reasonable. ABC, NBC et al stated that the present arrangement has worked reasonably well, with few runovers in fact (only 6 for ABC and 14 for NBC in more than a year's operation through the end of 1972) and those small, usually five minutes or less (ABC's six totalled some 31-1/2 minutes; of NBC's 14, 8 were 5 minutes or less, and some others ran over half an hour). It was also urged that these highly attractive events should be permitted to run to completion (since in other connections we have recognized their importance), and that very occasional runovers do not affect the demand for non-network programing since stations cannot count on it. 29/ The "roll-back" and "give-back" proposals above were labelled "administrative overkill", and described by NBC as highly impractical (e.g., where more than one game is presented on the network on a given day) 30/ or unfair (the "give-back" would put the networks and stations to a difficult decision as to whether to carry the event to completion and give back a half-hour later, or not). In sum, flexibility would be jeopardized without any benefit. Some proponents, such as INTV and Metromedia in reply comments, took basically the same position favoring the second proposal above, based on reasonable scheduling.

29/ In paragraph 36 and elsewhere in the Notice, we asked for information as to the effect of such runovers, particularly when short, on the use of and thus the demand for non-network program material. No specific information was supplied; as indicated in the text, some of the networks and others said there is little real effect, and NAITP did not deal with this question.

30/ NBC asserts that "rollbacks" occur at times in network operations, but only in unusual circumstances and with the consent of the affiliates to the special arrangements involved.

58. NAITP had a different proposal: since, assertedly, the networks are responsible for these situations both by their basic decision to "clear" early prime time and by the scheduling of these sports events, they should have the burden of adjusting them -- either by scheduling in a different manner so as to completely avoid the possibility, or by giving up the commercial positions in the "runover" period to the local stations to run the local commercials they would have carried in the absence of the runover. This would assertedly avoid the troublesome problem of "making good" to the advertiser the commercial time lost (said to be a problem between stations and program producers). It was also pointed out that the loss of a local commercial position costs the station considerably more than does the loss of a network commercial.

59. The matter of "post game" shows drew some comment, NAITP taking the position that these should never be permitted by way of waiver, since they could be run early in network time rather than immediately following the event. ABC agreed with a general policy not to accommodate these, as did NBC but only on condition that there be a general waiver for a number of "important" sports events. As to the latter, some parties, including proponent Metromedia, favored a blanket exemption for the World Series, the Super Bowl and the Olympics; NBC would go much further and include baseball and football division or conference playoffs, as well as NCAA, NIT and professional basketball playoffs, and Stanley Cup hockey. NAITP argued against any exemption by specific event, asserting that this would discriminate against growing sports such as soccer and tennis, and provide a growing loophole as "playoff" arrangements increase. 31/

D. Exemption for network news if preceded by a full hour of local news.

60. Paragraphs 45(a) and 46 of the Notice invited comments on whether we should continue, for the future, a policy adopted by general waiver (envisaged by "footnote 36" of the Report and Order adopting the rule, 23 FCC 2d 382, 395) exempting, from the three-hour limitation on network material during prime time, regular network newscasts if carried at the beginning of prime time (7 p.m. E.T., 6 p.m. C.T. and M.T.) preceded by an hour of local news or

31/ The 1972 denial of ABC's waiver request for 3-1/2 hours of Summer Olympic coverage -- probably the most controversial action taken by the Commission under the rule -- is regarded by most commenting parties (on both sides) as wrong, and it would be changed under either of two approaches urged -- an exemption for specific sports events as mentioned in the text, or, under NAITP AND INTV proposals, by blanket exemption to permit additional material where the network devotes all of its prime time to one kind of "special" programing.

public affairs material. The basic reason for this concept was that stations would comply with the rule if they carried a half-hour at 7 p.m., as numerous stations did and some still do; but there seemed no reason to arbitrarily force stations to this "bracketing" type of scheduling if they did not wish voluntarily to adopt it. It was also pointed out in a later decision granting such waiver that it may tend to promote an hour of local news or public affairs coverage, including "in-depth" treatment of important local matters which should be encouraged. About 25 top 50-market affiliates operated under this waiver in 1971-72, and about 23 do so this year, roughly half the number which carry a half-hour of local news at the beginning of prime time.

61. Some parties, such as proponent Metromedia and opponent CBS Affiliates, supported this as a desirable concept, promoting local news efforts. Others on both sides were opposed, on the ground that it represents an impermissible "quality" judgment that an additional local half-hour is better than something else would be, or inordinate "government fine-tuning". INTV opposed the concept both because of the impact on the availability of time to new non-network material and because stations should not have to be "bribed" in this fashion to fulfill their public-interest obligations if this requires a full local news hour. CBS and ABC, for the latter reason, urged that the same privilege should be accorded stations which present previously a local half-hour (which practically all do). It was also urged that stations should be permitted to make their own scheduling judgments, including getting, for network news, the greater audience after 7 p.m. if they choose to do so. NAITP, while basically against this exemption concept, suggested that it could serve a useful purpose if it were modified to require an hour of local news or local or syndicated public affairs material, which would encourage non-network production of such material (hitherto largely a network preserve) and tend to achieve presentation of such "serious" material opposite similar material rather than its having to compete with more popular entertainment programs.

E. News and Public Affairs Generally.

62. In paragraphs 45(a) and 47 of the Notice herein, we raised the question as to what the future policy should be with respect to network news and public affairs programs generally -- whether we should continue, or terminate, the waiver granted up to now for "one-time" programs of this nature (those not part of a regular series), or whether we should go further -- as some parties, including some members of the Commission, have urged in the past -- and grant a complete

exemption for such material. 32/ As we have pointed out on a number of occasions, there are important considerations involved here which to some degree may conflict: on the one hand, the importance of providing such material for the information of the public on significant issues, and, on the other, the importance of the presentation of such material from "diverse and antagonistic sources," so that all significant viewpoints may have a chance to be heard.

63. Comments on the subject were sharply divided. Four staunch proponents of the rule (NAITP, INTV, Westinghouse and Metromedia) urged that the networks do not need access time to do this material and should not have to be "bribed" in this fashion, but rather made to do it "on their own time"; that this exemption simply helps to preserve the virtual network monopoly in this area where diversity is highly important, and discourage new sources which, inter alia, could contribute by treating general matters from a regional or local standpoint; and that such material is now available from non-network sources to some extent, and will be to a greater extent if the sources can have assured access to prime time. (Metromedia refers to the Wolper-Metromedia-Xerox documentary on China, rejected by the networks and then successful in syndication). The three networks and some individual licensees vigorously supported a total exemption for news and public affairs or, at least, the present blanket waiver. The longest discussion was that of CBS, urging that a general exemption is required (to avoid having to pass on any specific material, which would present First Amendment problems) and that this whole restriction flies in the face of a number of cases stressing the importance of freedom of expression, with Mount Mansfield not really to the contrary because that decision (like the rule) dealt chiefly with entertainment programing. CBS claimed that this material, because of its high cost and relatively little return, has been and will be left largely to the networks to provide, certainly as to "hard news" and most documentaries, and any restriction has a chilling effect on the wide dissemination of material from diverse sources. Having to do this on"the network's own time" would be a real burden and not provide the "breathing space" required for such broadcast activities.

32/ The rule contains an exception for network programing which is "special news programs dealing with fast-breaking news events, on the spot coverage of news events . . ." No party opposed continuation of this exemption as such. However, the Notice pointed out that if waiver for "one-time" network programing of this sort is not to be continued, it might be necessary to define these concepts more exactly, and NAITP stated that any use of film in such programs should have to be strictly incidental. INTV urged that the quoted definition be tightened so as to make it clear that it refers only to "one-time only" news coverage, not regular network newscasts.

64. CBS referred to some specific programs or types of material. On December 26, 1972, the date of the late President Truman's death, CBS presented two programs about him and his career, one at 7:30 and one at 11:30 p.m. CBS asserted that there should not be any question about the propriety of either of these under the rule. The question was also raised as to four types of material, how they could be presented under a strictly applied rule (particularly if all the law under Section 315 is held to be applicable). These were: (1) political broadcasts which are not really a candidate "use," such as Governor Connally's address in support of President Nixon last year; (2) other "political" material such as the Democratic National Telethon program; (3) documentaries of high importance in connection with current issues but not quite "hard news," such as the CBS 1970 program "The Senate and the War"; (4) material required to fulfill the network's and its affiliates' Fairness Doctrine obligations such as the "Loyal Opposition" type of program. 33/

65. Political uses. The rule also contains an exemption for network programs which are "political broadcasts by legally qualified candidates for public office." The Notice proposed nothing on this subject; a few parties commented on the matter. NBC, INTV and NAITP all urged that the exemption be expanded to political broadcasts whether or not they are a "use," for example the Connally address mentioned above, the Democratic telethon, etc. NAITP had one proposal in the nature of a restriction: that before the exemption applies, it would have to be established that the network had not refused the candidate or other proposed user later prime time if he requested it.

F. The "Wolper Proposal"

66. The entity now called the Wolper Organization, Inc., headed by David Wolper, has long been a well-known producer of "special" programs, including documentaries (e.g., the Appointment with Destiny and National Geographic series). In its comments herein, it took no position as to the basic rule, but asked for a provision designed to promote the presentation of so-called "educational value" programing from independent production sources. This was defined as "programs of a factual nature produced by independent

33/ In reply comments NAITP's comment on these specific matters was that much of the material would be exempt under its proposed definition of "political programs," or otherwise; as to the fairness doctrine point, if CBS presented in its own prime time a program giving rise to such an obligation, why should it not present the balancing program on its own time also; and as to the two Truman programs, why should not CBS present these in its own prime time (especially since it ran one of them entirely after prime time).

production companies and involving subject matter of a scientific, cultural, historical, anthropological or other educational nature." The request is that if the rule is continued, such material be exempt from its provisions both as to network showing and later "off-network" distribution; or, if the rule is repealed, there be a requirement that the networks each devote an hour a week to such material.

67. Wolper's argument basically is the network exhibition is the only way this material -- very costly at least as Wolper produces it -- can be produced and distributed at all. Wolper emphasizes that it is not talking about a "panel discussion," or a program with a lecturer and a blackboard, but much more elaborate material which will have considerable "mass appeal" as well as educational value, and that typically this costs from $250,000 to $400,000 for a single one-hour program, in direct costs alone. It can recover these direct costs from the first network run, relying on network reruns, off-network sales, sales to schools, etc. for its profit later, but even recovery of initial direct costs is far beyond any potential income from syndicated distribution, either by direct sale or barter. Syndication is more expensive anyhow, with a 35% distribution fee (Wolper is not itself in the syndication business) and $5,000-10,000 per program for additional prints and shipping. In any event, individual stations will not buy without seeing a program; and these cannot be produced "on speculation." Rather, Wolper must rely on the network process, and it states that network prime-time clearance -- difficult under any circumstances, because the networks are reluctant to preempt their regular programs and often do not use "outsice" documentaries -- is virtually impossible with the curtailment of network prime time resulting from the rule. It is claimed that there are numerous large corporate sponsors willing and anxious to sponsor such material, in promotion of their corporate image rather than for hard product-selling; and with pressure from such enterprises and Wolper's past ratings successes it is possible to get network prime-time placement in the absence of the rule's restriction, but not with it in effect. It is also claimed that the "off-network" market -- relatively large because this material has a rather long life -- is necessary to justify the risks involved. Wolper states that it is simply asking for access to prime time for its material and similar programs, not necessarily as expensive, produced by others, in a fashion which will clearly further the public interest by encouraging the use of such material but not involve any ad hoc waivers or "quality" judgments. Wolper claims that the character of access-period programing so far shows the impossibility of presenting Wolper-type material on a syndicated basis.

68. This proposal was supported in reply comments by two similar organizations. It was vigorously opposed by NAITP, as a "censor's dream," involving the Commission deeply in judgments

about what kind of programs are "worthwhile," e.g. a dubious "fact-fiction" distinction, and also presenting very substantial definitional problems. NAITP pointed out that, for example, "game shows" could well be included, since they are factual rather than fictional and often involve informational matters (quizzes, etc.). Wolper also submitted reply comments, devoted to a legal argument in support of using its proposed program classification, and to an attempted rebuttal of Metromedia arguments that documentaries can feasibly be produced for distribution via syndication.

IV Other Matters

69. We discuss in this section the comments on various other subjects: (1) those concerning the matters raised in the Inquiry portion of the Notice herein, Section C (pars. 51 to 57); (2) various problems and possible approaches suggested by some of the opponents of the rule in dealing with the matter of network domination, if, as they urge, the approach represented by the prime time access rule is abandoned; and (3) appropriate effective dates for rule changes.

A. Subjects in the Inquiry portion of the Notice.

70. In the Inquiry portion of the Notice herein, comments were invited on four general types of changes in the rule:

(a) Extension of the scope of the rule either as to time (e.g., making the "access period" 1½ hours per night instead of one hour) or as to the number of markets covered, possibly to all having three or more affiliated stations; or extending the "off-network" and "feature film" restrictions to independent stations, or at least to independent VHF stations in the top 50 markets.

(b) Possibly requiring a certain amount of the "cleared time" of the access period to be devoted to certain types of programs, such as local "live" programs, programs of particular significance to minority groups or children, or those relating particularly to the important problems of the community as the station has ascertained them (usually local but also possibly including syndicated programs as well);

(c) Encouraging the presentation of the same kinds of material by exemption from the rule's restrictions on network and "off-network" material.

(d) Changing the form of the rule so as to specify a particular hour as the "access period", e.g., 9-10 p.m. E.T. or 8-9 p.m. C.T. (the third hour of prime time).

71. Extensions in the markets or time covered. Several parties commented in this area, nearly all adversely. The opponents of the rule asked why a bad rule should be extended; proponents asserted that what is needed is affirmance and vigorous application, and working out the rule's problems, not extension. It was said that the present rule gives a substantial economic base for non-network programing. There is no need to expand the rule to cover other markets, because it would add nothing significant in terms of economic support, and could harm smaller-market stations with their thinner economic base.

72. Extension to independent stations. ABC and some other parties expressed mild support for extending the "off-network" and "feature film" restrictions to independent stations, particularly VHF, since they are potential customers for first-run product and that product would be helped, audience-wise, if it did not have to compete with popular off-network material; but ABC also suggested that many such stations are already complying with the rule by presenting an hour of "eligible" material each evening, so that a suitable and effective rule would be hard to draft. CBS and CBS Affiliates expressed approval of this theoretically, to remove discrimination; but likewise doubted that it would have much effect and at best would represent more "Government intrusion"; and urged that the rule be repealed instead. Metromedia (with 5 independent stations) and INTV naturally expressed vigorous opposition, stressing the basically different position of independent stations (who must buy their programing) as against "network-riding" affiliates, with long-standing disadvantages to the independents now being partly corrected by the rule. Other arguments, such as the need for at least some "after-market" for network programing which independents now provide, were also stressed.

73. Requiring or encouraging certain types of programs. The proposals to require or encourage (by exemption) certain types of material drew general opposition, as involving simply further Government intrusion into programing decisions which are supposed to be for the licensee, subjective and sometimes unwarranted judgments that certain types of programs are generally preferable (e.g., mediocre local vis-a-vis highly worthwhile non-local), and serious definitional problems -- e.g., are Bridget Loves Bernie and Sanford and Son to be considered "minority" programs, and how could a "children's program" possibly be defined for this purpose? It was also urged by ABC that emphasis on either local programing, or on network programing of certain types by way of exemption, might work to frustrate one of the rule's key objectives: encouraging the production of independent first-run syndicated material. It was claimed that the rule is already working to further the

objectives which might be promoted by such regulations, e.g., the increase in local prime-time material, and no additional impetus is needed. It was asserted that any approach of this sort would simply breed requests for the inclusion of other types of programs in the "approved" or "preferred" categories, and any exemption for network programing of certain types would simply increase the uncertainty on the part of independent producers as to how much and what time will be available for their products. It was also contended that the renewal process may and should be looked to in order to achieve desired results in the area of meeting particular local needs.

B. Alternative approaches to the problems of "network dominance".

74. Some parties opposing the basic rule -- notably some of the "majors" and Screen Actors Guild et al -- asserted that "network domination" and how to control it are a major problem, even though the present rule is not a suitable, and indeed is a counter-productive, approach to meeting it. Various matters were mentioned, including the semi-permanent affiliation relationship, low interconnection costs, and control of non-network programing and its development through their owned stations, as all entering into the basic situation of network dominance. None of the parties advanced really specific proposals in this area; some approaches touched on generally were possibly getting the networks out of entertainment program production (a potential threat of great leverage in dealing with program suppliers), opening network prime time to program sources generally (such as the "50-50" rule originally proposed herein) and making sure that stations are able to preempt network programs without fear of reprisal. At oral argument, the matter of possible network pressure on producers to use their facilities was mentioned.

C. Effective date of rule changes.

75. Paragraph 28 of the Notice herein asked for comment on appropriate effective dates of various rule changes which might be adopted herein. Of the parties commenting on this point, some, chiefly the "majors" Warner Brothers and MCA, urged repeal effective almost immediately, or for the 1973-74 broadcast season. It was urged that the rule is clearly contrary to the public interest and therefore should be repealed as quickly as possible, without taking into account the asserted private claims of parties that quick repeal will harm them. It was also urged that this is possible; the networks can accelerate programing projects already on the drawing board, and there

was reference to a telegraphic comment from QM Productions, a smaller producer opposing the rule, stating that CBS has been able to get delivery of a series three months after it ordered it. Warner Brothers also urged that at least the rule should be repealed effective January 1974, when the networks normally make substantial programing changes anyhow, sometimes as much as would be involved in expansion to 3-1/2 hours a night. Some individual licensee opponents of the rule also requested "prompt" or "immediate" repeal, but without any specific target date or any discussion of this particular point.

76. On the other hand, other parties, including NBC as well as proponents ABC, Metromedia and INTV -- urged that a longer period is necessary, and that at least as to any change such as repeal, or even a substantial relaxation to something like a "21 hours a week" standard, the effective date should be only the beginning of the 1974-75 season, or roughly October 1, 1974. This was urged basically for two reasons. First, Metromedia and ABC claimed that it would be most unfair and highly injurious to independent producers who have been relying on the rule -- and who have had to proceed for the near future in spite of the uncertainty -- to repeal the rule effective in 1973. ABC asserted that such parties would be seriously injured by a "cavalier" action of this sort. Metromedia urged that the Commission should not put in jeopardy those who have risked substantial money and effort in attempting to bring life and substance to the rule's objectives. ABC and NBC also emphasized the need for adequate lead time in program planning, which begins some 18 months ahead of the season, or at least a year before. It was said that programing plans are made the previous summer, pilots are produced during the fall, the final program selection is made in the first two months or so of the calendar year, and then scheduling and selling begin. It was claimed that at least this much time is necessary for orderly planning, and much less will lead to network programing of lower quality and thus defeat the purpose of repeal or relaxation. CBS did not take any position on this point in its comments, but at oral argument stated that while the rule should definitely be repealed, this should not be effective before September 1975 -- CBS needs that much lead time to develop programing.

V - DISCUSSION AND CONCLUSIONS

A. The Rule adopted and the basic reasons for it.

77. The rule adopted. As outlined in paragraph 3, above, the rule adopted herein provides:

(a) There will be no restrictions on the 7-7:30 period (6-6:30 C.T. and M.T.), nor on Sunday 7:30-8 p.m. (6:30-7 C.T. and M.T.).

(b) As to the remainder of what is now prime time, the only restrictions relate to the 7:30-8 p.m. period (6:30-7 C.T. and M.T.), Monday through Saturday. Of these six half-hours, at least five must be devoted to programing (local or syndicated) which is neither network, off-network nor feature film. The sixth half-hour must be devoted to the same use except to the extent that it may be devoted to network or off-network programs which are either children's "specials" (Cinderella, The Grinch, Charlie Brown programs, etc.) or public affairs or documentary programs. The latter are defined as "any program which is non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program." See paragraph 88, below, concerning uses which the Commission will expect licensees to make of an appropriate portion of these "cleared" periods.

(c) The rule also contains provisions -- not immediately pertinent to the basic analysis, and therefore discussed briefly later rather than here -- to deal with sports runovers (to the small extent necessary now that the rule applies only after 7:30), time-zone differences, where "simultaneous" programing is involved, and "Summer Olympic" type situations where the network devotes all of its prime time to a special type of programing and wishes to extend it to the 7:30 half-hour.

78. Thus, there are essentially five areas of change (in addition to the expectation concerning use of part of the "cleared" time for material of particular local significance): (1) the removal of all restrictions on the first half-hour;

(2) permitting an increase in network programing on Sunday of up to an hour, or a total of four hours; (3) tying "cleared" prime time specifically to the second half-hour of prime time Monday-Saturday (7:30-8 p.m. E.T. and P.T., 6:30-7 p.m. C.T. and M.T.); (4) permitting one of these six half-hours to be used for network or off-network material of certain types -- children's"specials" or public affairs or documentary material; and (5) barring "feature film" entirely from these six half-hours.

79. Reasons for removal of 7-7:30 p.m. restrictions. We have been prompted to remove restrictions from the first half-hour of present prime time (7-7:30 E.T. and P.T., 6-6:30 C.T. and M.T.) by various considerations. First, as far as Monday-Friday is concerned, the use of this period by top-50-market affiliated stations represents singularly little in the way of opportunity for the development of really new syndicated material. This was true before the rule -- when this was "station time" not used by the networks -- and it has continued to be true, since the basic programing pattern has not changed much except that stripped game shows have increased their share of the time by the elimination of stripped off-network shows such as I Love Lucy and Dragnet. Four of the six stripped games shows now involved -- Truth or Consequences, To Tell the Truth, What's My Line and Beat the Clock -- were shown in this time slot on top-50-market affiliated stations before the rule, although not as much as now. As shown in Appendix C, of 139 affiliated stations in 46 of the top 50 markets, 66 present local or network news (the latter under waiver) at this time, and another three show blocks of movies, which are not "new" material. Of the remaining 70 stations, 56 strip one of the six game shows mentioned, and at most 14 present what could be called "new" material -- two stripping the Merv Griffin talk show, and 12 presenting "variegated" programing, pretty much a different access-period program each night. Thus, only about 10% of the stations covered, one in the top 10 markets, present material which needs the rule's encouragement. 34/ We do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into. This consideration does not apply particularly to the weekend, but we have concluded that some increase in network programing should be permitted, and Sunday appears a desirable time for this, including the 7 as well as 7:30 half-hours,

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34/The situation seems to bear out the Westinghouse statement, made in response to petitions for reconsideration of the rule filed in 1970, that it is not absolutely necessary to apply the same restrictions to this period as to the 7:30 half-hour.

traditionally a popular family entertainment network period. There seems little point in maintaining a restriction only for Saturdays. Thus, in this respect, it appears that maintenance of the rule's requirements with respect to the first half-hour would be a restraint without sufficient justification.

80. There are also some problems in connection with the present restriction on the first half-hour, and more are beginning to develop. The "network news" waiver arrangement has worked reasonably well so far, but we are faced with increasing demands for its relaxation, including the arguments mentioned in par. 61, above, requests for waiver in connection with ABC's Reasoner Report program (to permit it to be carried after 7 on Saturday or Sunday), requests to carry network news at 7 on Saturday or Sunday when a sports event preempts the station's usual hour for network news, and a request in comments herein (which might have public interest benefits) to permit network news at 7 in markets where there is now none (without a preceding full local hour). The possibility of increasing network news time from its present half-hour has also been mentioned, a development which might well be in the public interest. These are not insoluble or terribly difficult questions, but they would require some careful adjustments; and in view of the very little benefit accruing from this period to the cause of promoting really new non-network programing, we conclude that the need for such "fine tuning" should be dispensed with. There is also another consideration: for reasons discussed below, we have decided to adopt herein two provisions which in some ways cut down licensee flexibility compared to what it is now -- barring feature film entirely from the six Monday-Saturday 7:30-8 p.m. periods, and requiring that these specific periods, and not simply an equivalent amount of prime time during an evening or a week, be cleared of network and off-network material. It is therefore appropriate to provide stations with some compensating flexibility elsewhere, and, in view of the small contribution which these hours make to the development of really new material, the best course is to provide for this flexibility during the first half-hour of prime time. Thus, for example, on Saturdays (or any other day, for that matter) a station may present a feature film from 6:00 to 7:30 or a one-hour off-network show from 6:30 to 7:30. Moreover, this action may, to some extent relieve the problems of the "majors" and similar parties, by increasing the after-market for former network material.

81. In reaching this decision, we recognize that it may in some cases work to the disadvantage of independent stations, in that they may for the first time under the rule be faced with the competition of popular off-network material during the first half-hour. However, we do not regard this as a serious reason not to adopt this change. While probably the advantage which the independents have at present for a full hour is, overall, in the public interest, nonetheless the rule in this respect represents a form of disparate treatment of competing entities, and therefore should not be carried further than it can really be justified. We conclude that the remaining half-hour of this advantage to the independents is sufficient to satisfy the demands of the public interest.

82. The network increase and retention of five or six "cleared" half-hours. In these respects -- which are probably the crux of the decision we are required to make at this time in this proceeding, representing an adjustment of competing demands for access or for exclusive access -- we have reached what, at this point, appears an appropriate balance. This provides the networks with opportunity to increase their programing by one or two half-hours, Sundays from 7 to 8 or half of that hour, and reserves either five or six half-hours per week cleared of network programming or off-network material or feature film. 35/ It may be that, like many compromises, this will entirely please no one. It represents certain judgments which we believe are required by the material set forth above -- that the performance under the rule so far certainly does not warrant the complete reservation to non-network material of the entire week's time, even of 7:30 - 8 half-hours; but conversely, particularly since the rule has not yet had an adequate test, neither does its performance warrant either repeal or a really substantial reduction in cleared time such as to three or four half-hours a week. Both of these

35/ The networks may, of course seek to clear programs during the first half-hour of prime time on any day if they wish to do so. However, in general they have never regularly programed this time any day but Sunday, except for a few Saturday sports events.

matters -- evaluation of the rule's performance, and whether it has had a fair test up to now -- are discussed below. In reaching the balance, we regard it as important to preserve substantial "cleared" time for the development of local programing efforts -- one of the really significant benefits from the rule so far -- and at the same time also to preserve considerable potential for the development of first-run syndicated programing. We emphasize that this is a judgment made in light of facts at this time, fairly early in the rule's existence and after it has an adverse life psychologically even if not otherwise.

83. Permissible uses of one of the six periods. We have provided that one of the six "cleared" periods may be used for network or off-network material if it is of certain types -- children's "special" programs, public affairs or documentary material (the latter defined rather broadly). In reaching this decision, admittedly we have rejected the views of numerous parties who asserted that this is impermissible "quality judgment" of one kind of program as being better than another, making the Commission in effect a "national program director", inevitably leading to requests for similar preferred status for other types of material, and often presenting serious definitional problems. Bearing in mind the limited scope of the action taken -- that it is permissive, not a requirement, and that it relates to only a half-hour a week -- we do not conceive these objections to have merit. Moreover, our action reflects not so much a view that these kinds of material are "worthwhile" -- although admittedly this is a factor -- as that under the present rule its presentation involves certain special problems. For about the last year, one of the most common complaints from viewers (including parents, educators, and children themselves) is that desirable and well-received children's "specials" such as Cinderella, The Grinch that Stole Christmas and the Charlie Brown programs, may start on the network only at 8 p.m. in the normal course of programing, and this makes them too late for children's viewing if they are to observe a reasonable bedtime hour. Therefore, it is desirable in the public interest to facilitate the showing of such material earlier, if this is what stations choose to do. As to public affairs and related documentaries, one of the criticisms

of the rule is that it has resulted in the total or partial disappearance of such material from prime time. The rule may well not be the sole, or even the major, cause of this; but in its present form it certainly does not make any easier the presentation of such programing, which is expensive and not commercially lucrative; and the rule should be changed to make such broadcasting easier. At least so far, there is relatively little new product of this type available from non-network sources.

84. Moreover, this relaxation will make easier certain other kinds of documentary material which is otherwise difficult under the rule, for example the kind of factual network documentaries mentioned by The Wolper Organization (par. 66 above), and off-network material, particularly that which is an hour long, such as the National Geographic and America series. In various "off-network" waiver actions we have found such presentation to be in the public interest; but we agree with Westinghouse, NAITP and other proponents of the rule that this process is an undesirable one, getting the Commission, at least to some extent, into the evaluation of "program quality" with respect to individual material, and creating uncertainty on the part of independent producers (the "house of cards" or "floating crap game"). The rule change adopted affords leeway to permit stations to use such material if they choose to do so, without getting us into individual evaluations. This is the chief reason for not limiting the documentary exemption to those relating to news and public affairs. 36/

36/ We also realize that in a sense this action could be regarded as inconsistent with the Notice herein, in which we raised this question -- permitting certain particular types of programs by way of exemption -- in the Inquiry portion, among matters as to which we did not contemplate adopting rules without further proceedings. However, in view of the limited amount of time involved, the permissive rather than mandatory nature of the change, the extensive exploration which this subject received in comments in various connections, the fact that this is in effect a partial repeal of the rule, and the obvious interest in reaching a final and complete decision in this proceeding as early as possible, we find rule amendment at this time to be in the public interest.

85. Tying the cleared time specifically to the 7:30 - 8 p.m. period. As mentioned earlier, one of the complaints against the rule has been its "lack of flexibility", in requiring one hour of "cleared" time every evening rather than permitting deviations to 3½ hours of network or off-network material on some nights with a corresponding cutback on other nights, or a flat weekly "21 hours a week" limitation on such material. The Notice proposals and the comments in this respect have been noted above. We are, of course, moving in the other direction in the rule amendment adopted herein, by specifying not only the amount of cleared time each evening Monday - Saturday, but the portion of the evening when it is to occur. We have done this in the interest of certainty and stability -- letting networks and stations know what time will or will not be available for general use (for them and for their competitors as well) and giving independent producers a specific time-period, and therefore a particular composition of audience, to aim at. Moreover, there is substantial significance in the argument that it is better, at this still rather early stage of the rule, for "access period programing" to be shown opposite similar material on other stations, rather than to have it shown in competition with perhaps the most popular network shows (for example, stations affiliated with ABC or NBC might choose to present locally produced public affairs material opposite All in the Family on CBS, when they would likely not get a large share of the audience anyhow; and the same could apply to ABC and CBS affiliates vis-a-vis NBC's Sanford and Son). For these reasons, it appears that the cause of flexibility is outweighed by the additional stability and certainty thus gained -- particularly with the flexibility which has been added with respect to the first half hour of prime time.

86. Barring feature film from the 7:30 periods Monday-Saturday. We have decided to bar feature film entirely from the 7:30 - 8 p.m. "access period" slots (6:30-7 p.m. C.T. and M.T.). This total ban was not proposed in the Notice, nor was it really urged as a proposal by any of the parties (although NAITP suggested that it would be the best way of promoting the rule's objective of encouraging new material, which feature films, either made-for-theatre or made-for-television, obviously are not). We conclude that this is an appropriate, and indeed the best, approach to what is otherwise a difficult and rather complex problem -- how to apply such distinctions as "made for theatre" or "made for television", or previously shown on a network or not, or previously shown in the market within a given period or not (and if so, at what time of day they were shown). All of these distinctions were somewhat artificial at best, and served chiefly to provide a limitation on use of movies to fill "cleared" time, which is necessary if the production of new non-network material is to be encouraged. There appears to be merit in the arguments, by opponents of restrictions, that the present rule unduly restricts licensees in the selection of movies they believe desirable (whatever their origin or last telecast), and that stations should be able to present a movie fairly often during prime time in order to recover its high cost, if their judgment so indicates. Therefore, we believe it preferable to approach the objective directly, by removing restrictions on use of this or any material from the 7-7:30 p.m. time slot, and barring it completely at 7:30. This will enable stations, for example, to present a 90-minute movie on Saturday from 6 to 7:30 or indeed any other day of the week.

87. As shown in Appendix C, this does not involve a drastic change with respect to most stations. As of October 1973, three affiliated stations in the top 50 markets "strip" movies between 6:30 and 8 p.m. on weeknights, including ABC's two owned stations in California and a station in the Norfolk-Hampton area. The ABC stations followed the same practice in 1970, except that the movies were run from 6 to 7:30, and they may, of course, resume this practice. The Hampton-Norfolk station has so programed movies only since the rule, apparently because of the dearth of other non-network material it finds suitable, and is not entirely happy with this type of programming, according to its comments. With the removal of the 7 p.m. restrictions, it may be able to dispense with this practice without substantial impact. Some 15 other stations would be affected with respect to one (or in one case two) nights a week. We do not conclude this to equal the benefits which will flow from keeping 5 or 6 of the 7:30 segments free from this, as well as from network and off-network, material. Stations may, of course, preempt network time later, as a number do and long have done, if they wish to present their own movies, in addition to the 7 p.m. period mentioned.

88. Use of "cleared" 7:30 periods for locally significant material. It is important to set forth here our expectations in this connection. We expect that stations subject to the rule will devote an appropriate portion of this "cleared" time, or at least of total prime time, to material designed for children, material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or other material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs. Such programing efforts are necessary if the benefit of the rule in stimulating locally meaningful programing is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programing of the significant character mentioned need not necessarily be all locally produced; a syndicated program such as Black Omnibus may well represent significant programing in the minority-affairs area. 37/

B. Discussion of significant arguments

89. Whether the rule has had a fair test. As mentioned in par. 32(2) above, the proponents and opponents of the rule differ sharply as to whether, at this point, the rule has had a fair test. In our view, it has not, at least in the sense that the somewhat mediocre showing so far can be regarded as showing that nothing different is to be expected in the future. As indicated above, this is one of our chief reasons for not moving further at this time in the direction of either repeal or of opening up more prime time (particularly former network time) to network programing and to those producers who prefer the network route. In reaching this conclusion, we note the rule's relatively new status -- in the first half of its third year, with the first in a sense "a different ball game" in that off-network material and all feature film could be used -- and the historic preference of stations and others for the "tried and true" which takes time to overcome (e.g., ABC's showing concerning

37/ Network programing during the uncleared portion of prime time may of course also make a significant contribution in this respect, where it deals with needs or problems common in substantial degree to many communities.

the popular TV shows of the 1940's as being continuations of radio programs). Of equal, and perhaps greater, importance is the unfavorable climate which has prevailed, due to the uncertainty as to the rule's future, for a number of reasons mentioned previously. This would obviously tend to discourage the investment by producers in costly, and particularly in "novel", programing, and -- as NAITP et al urge -- might also discourage stations from being interested in such material, and of building an audience for it, when they have the easier and cheaper alternative of going with less expensive material (such as game shows, with a "track record") and thus simply showing greater profits for the short time the rule would likely be around.

90. In reaching this conclusion, we have noted the arguments of the opponents, particularly the "majors" and their representatives, that nothing different will develop in the future because of certain built-in factors which have been made manifest by now and which will not change. These include, notably, the asserted ceiling on the amount per episode a first-run syndicated program can be expected to gross (and the greater cost of distribution). 38/ and the fact that stations will always tend to prefer cheaper material, such as inexpensive U.S. game shows (which have at least some degree of established popularity) or foreign "off-foreign network" product also available relatively cheaply. Undeniably, these may be long-term factors. But we believe the rule has not yet had a test sufficient to demonstrate conclusively that these are, or will forever be, the iron-clad limitations which they are claimed to be. We note, for example, two new programs this season (Dusty's Trail and Ozzie's Girls) which have won wide station acceptance and which represent the re-entry and entry, respectively, of two of the industry's more powerful entities into production for first-run syndication. There is also the possibility -- as ABC and others urge -- that stations may be persuaded, with time and the firmer establishment of the whole idea of first-run syndicated material other than game shows, to pay prices higher than those they are now paying. Certainly, there is nothing inherent in their revenue picture to prevent this (see footnote 16,above)

38/ This ceiling does not appear to be as low as the opponents claim (in the order of $50,000 per episode). Metromedia grossed over $80,000 (including foreign sales) for its 1971-72 Primus series, and expects to do about the same for Dusty's Trail, and Let's Make a Deal will have grossed $80,000 domestically, although it does not take anything like this to produce this game show. Moreover, it is clear from the record that producers such as Metromedia do not expect to make a profit, or necessarily break even, on the first run. Considering that there are savings possible compared to network production (talent will work for less, and there are other items) this ceiling is not too much below the $100,000-plus per half-hour cost figure estimated for network programs.

91. In sum, while we do not believe the record is such as to warrant the complete restraint on network and off-network programing which the present rule provides, we do not believe the rule has had a sufficient test to demonstrate what its future performance will be, so as to warrant further abandonment of it, in view of the benefits accruing, such as stimulation of local programing efforts, a return to individual licensees of a portion of the decision-making process as to prime time, and opportunity for producers not choosing to operate through the networks.

92. The programing record under the rule so far. In light of our conclusion, immediately, above, that the rule has not yet had a fair test to determine its potential, we need not look too closely at the programing record under the rule so far. As set forth in Appendix C, based largely on the various filings by the major film producers (which was the most comprehensive of the program showings),39/ this can hardly be called distinguished, and there are certain developments which unquestionably are, as they should be, grounds for concern, and will be grounds for much greater concern if the picture, three years from now, is generally the same. These include such matters as a marked increase in the stripping of programs (generally game shows) in the 7:30 period (compared to the variety of network material presented then in 1970 and before), 40/ and the increased use of foreign product, which -- while it should not be prohibited or seriously discouraged -- nonetheless cannot be regarded as a favorable result of the rule, since it means less use of U.S. material (and thus U.S. production activity and employment) and also likely these programs do not have the same overall potential for "relevance" as do programs produced here (dealing with current American themes and problems, etc.). Also, the greatly increased use of game shows itself can hardly be regarded as a favorable result of the rule, not necessarily as such but in view of the extent that these are either stripped in prime time or represent "sixth episodes" of game shows made for network daytime stripping.

39/ As discussed in Appendix C, the "majors" exhibits have not been questioned for accuracy using the assumptions on which they were prepared, and our staff's check indicates that they are approximately correct on the same assumptions. The proponents of the rule strongly criticized them, inter alia for emphasizing the access-period time devoted to particular programs, rather than the number of programs actually available for access-period use. We find this objection without merit. The greatest program on earth is of no value to the public unless some station will buy it and show it.

40/ This is particularly true in situations where a station strips Mondays through Fridays two game shows, one at 7 and one at 7:30, and in markets where all three affiliated stations strip game shows at the same time.

There has been a corresponding decline in other categories of programing, such as drama, and much of what there is is foreign product (in 1972-73 75% of dramatic-program time in the access period was devoted to foreign programs; the figure is considerably higher this year because of the demise of the Young Dr. Kildare series).

93. But the picture is by no means entirely unrelieved. For example, with the advent of two new U.S.-produced comedy programs in 1973, Dusty's Trail and Ozzie's Girls, there is more time in the access period devoted to comedy programs, and a much greater percentage of this is U.S.-produced than was previously true. Overall, the percentage of foreign product is down somewhat now compared to 1972, and local programing efforts have continued to increase. Programs of the nature-outdoor or "animal" category have also continued to expand in number and exposure.

94. Moreover, there are serious limits on the extent to which we can take action based on judgments in this area. We certainly do not agree with NAITP et al that we cannot properly look at the character of the resulting programing at all; but certainly any operational judgments based on such a look must be made with circumspection. Otherwise, we find ourselves tending to impose our own judgments as to what is or is not "program quality", an "over-used" or "under-used" type of material. There is the additional problem of what any judgment of program quality would use as a basis for comparison -- the 7:30 network programs of 1970 (even though there have been some general changes in the networks' approach to prime-time programing since then), the 8 p.m. network programs of today (even though the audience then is larger overall than it is at 7:30, and less "mixed", and the networks do not have any half-hour time limitation), or only the successful network programs of any year, disregarding the numerous failures, including some already this year. These are comparisons which are difficult to make. We see no need for it at this time, in view of our conclusion above that the rule has not yet had a fair test as to its potential.

95. "Number of producers represented in access time." As mentioned in par. 32, above, the proponents and opponents of the rule differed sharply as to the comparative numbers of producers represented in access time (or total prime time) in 1970 before the rule and in 1972 under the rule. The difference was basically one of semantics; the number of producers of first-run syndicated material was greater in 1972, but it was less than the total number of producers represented in 1970, including network and "off-network" programs as well as first-run syndicated material. (If the producers of "off-network" programs included for 1970 were not counted, since this was not new material, the result might well be pretty much a standoff numerically between 1970 and 1972). In view of our basic conclusion above that it is too early to evaluate the full potential of the rule, we need not at this point get into this question.

96. Exclusion of network programing which would otherwise be presented. This point was vigorously urged by various opponents of the rule, including the "majors", union and guild representatives, and independent producers who oppose the rule and are members of the National Committee. The argument runs that the rule has produced nothing good in the way of programing, and at the same time, by lessening the amount of prime time available to the networks, has reduced the time they can devote to significant new programs, such as programs including members of, and of interest to, minority groups, situation comedies of particular interest to women, etc. It is said that this unfairly penalizes producers preferring the network route. In this respect also, we conclude that it is too early to make a judgment. There are various points to be noted. First, these independent producers are free to enter the non-network production activity whenever they wish to. Second, no conceivable change in the rule is going to permit all, or even a much larger part, of program ideas to gain network exposure. For instance, the major film producers in their latest filing (September 1973) claim that of 217 pilots presented to the networks for new program series in the last two years, only 33 became regular series and 24 were given partial exposure; the remainder, 160, got nothing. Adding 24 half-hours per week for the three networks might reduce this last figure to something in the order of 140, still nearly two-thirds. The third point is related to the same matter -- if considerable amounts of prime time were given back to the networks, it is hard to say how they would fill it to the extent they decide to use it -- with additional programs or largely to increase the length of existing shows. For example, NBC's announced program schedule for the January 1974 "new season" includes only 19 programs filling the 21 hours of prime time, with movies 5 nights per week. Thus, the result might be largely to add to the length of existing movies or other material, rather than to increase the number of programs. This is perhaps particularly true since two of the networks, ABC and NBC, do not support a change in the rule in this respect. 41/

41/ A related argument advanced by some opponents of the rule is that only the networks have the resources or the fortitude to start a "different" or controversial program and to continue with it when it is not initially popular. We find this much too speculative to afford basis for modifying the rule beyond the increase in permissible prime time mentioned, in view of the uncertainty mentioned in the text, the fact that we cannot at this time evaluate the rule's full potential with respect to the programs which are likely to be offered and presented in the future (already discussed) and the problems which have often been presented in programing the 7:30-8 p.m. period, which is what is basically involved here.

97. "Network dominance". It was vigorously urged that the rule works to increase network control and dominance, rather than lessening it, by creating an artificial scarcity of prime time and strengthening the networks' control over what remains vis-a-vis advertisers and program suppliers. This must be regarded as somewhat speculative, in view of the strong degree of dominance inherent in the networks' position, as long as they are three sellers on the one hand, as against hundreds of potential national advertiser customers, and three buyers on the other hand facing more than 100 producer-sellers. By contrast, the reduction in control through removing 11 or 12 hours a week from"the network funnel" is definite and readily apparent. It is true that the role of the owned stations in the success of access-period material is considerable, but this appears to be somewhat less true now, when these stations are buying somewhat less as a group. We do not find in these considerations any reason, at this time, to act to relax the rule any more than indicated above.

98. "Impact on Hollywood" and use of foreign material. These two related lines of argument, vigorously urged by opponents of the rule such as union and guild groups and the major film producers, involve areas outside of the normal ambit of the Commission's expertise. Moreover, in some respects, such as the degree of protection from foreign competition which should be afforded, they involve questions of general national policy which are basically beyond our jurisdiction to decide. At this juncture, when there is not yet an adequate basis on which to evaluate the full potential of the rule in these respects as in others, we conclude that they do not afford a basis for any present relaxation of the regulation beyond that adopted herein.

99. Moreover, there are other uncertainties and complexities which make any evaluation difficult, particularly as to the "impact on Hollywood" question (see Appendix D). These include the lack of any real information as to how much the loss in Hollywood network-program production activity has or has not been "made up" by syndicated and local programing efforts, other factors affecting the situation, some of them of long standing (including increased network prime-time use of movies and "re-runs", each regarded by OTP as about equal in impact to the prime-time rule, and long-standing developments adversely affecting U.S. motion picture production), the substantial income accruing to Hollywood in recent years from the making of TV commercials, the extent to which any decline in film production activity and employment simply represents a changeover to videotape production which involves to some extent different unions, and the uncertainty

mentioned above as to what kind of use the networks would make of any additional time. As to the use of foreign product, this is down slightly in 1973 compared to 1972, and it is not possible to tell how much it may be affected in the future by recent changes in international currency and trade relationships, as well as by possibly increased U.S. program production coming with greater certainty as to the rule.

100. "Commercialization" and increased access to non-national advertisers. These two considerations, mentioned in paragraph 32(4) above, are conflicting but difficult to weigh because they are quite different. We conclude that, bearing in mind that individual licensees may, and some do, limit the level of commercial activity in syndicated programs, these considerations are about equal pro and con.

C. Other Matters

101. News-public affairs and the "Wolper proposal". As mentioned previously, the rule adopted herein permits one of the six normally "cleared" 7:30 segments each week to be filled with network or off-network material of certain types, including public affairs and documentaries. One of the important reasons for this is to encourage the presentation of regular network prime-time public affairs or "news documentary" programing, which has recently declined considerably. 42/ A second reason is to encourage the presentation of other kinds of network or off-network documentaries, such as those produced and discussed herein by Wolper.

102. The question for decision at this point is what further provision for such activities should be made, if any. As to news and public affairs, should we grant a blanket exemption, or continue the "one-time only" waiver for such material now in effect? Should there be any further exemption for other documentary material, as urged by Wolper?

42/ Providing for regular presentation of news and public affairs material will eliminate questions which have occurred in the past, as to when a "one-time" program becomes a regular series, for example a series of post-primary election analyses which, naturally, come on Tuesdays.

103. With respect to documentaries generally, such as those involved in the "Wolper proposal", in our view the rule change adopted, permitting one of the six weekly "cleared" half-hours to be used for such material from the network or when it is off-network, is all that is warranted, consistent with the rule's objectives and the public interest. As to news documentaries and public-affairs programs, we have decided that the best way to deal with this is by liberalizing slightly the exemption now in the rule for "on the spot" coverage and fast-breaking news events, by adding the phrase "and related programing" to that sub-paragraph. This will make it clear that when an important event occurs, warranting unusual network coverage, that coverage need not consist only of on the spot material, but may include programing such as the CBS broadcasts in the evening of the death of former President Truman (interviews with him filmed some years ago).

104. It appears that the two modifications thus made -- permitting regular network (or off-network) public affairs programs during one of the six weekly "cleared" half hours, and permitting coverage of important events to include "related" as well as actual on-the-spot coverage -- will provide sufficient opportunity for the presentation of this important material. We are extending, until the effective date of the rule changes, the waiver granted to the networks for 'one-time" news and public affairs programs. We do not now decide finally the question of whether this kind of waiver should be extended further into the future, but we are inclined to the view that with the liberalizations mentioned, and the availability of network prime time in quantity for this purpose, further waiver of this sort will not be appropriate.

105. Political broadcasting. This exemption to the rule was not discussed in the Notice, but was in some of the comments; see par. 65, above. We are adopting herein the request that the rule not be limited to political candidate uses, but may include any political broadcasting activity by or on behalf of a candidate or candidates. This will resolve questions such as the Connally-for-Nixon broadcast of 1972. We are not adopting, at least at this time, the NAITP suggestion that the exemption apply only where the network has not refused the candidate time during its regular network programing hours, as happened in 1972. It may be that there is merit in this suggestion, but we do not have enough information to evaluate it with assurance. With the next general election nearly three years away, there is enough time to consider this if it is raised again in the near future.

106. "Off-network" programing. As noted above, the 7 p.m. (E.T.) half-hour is freed from any restrictions, which means that if stations choose to do so, they may fill it with off-network programs. We are not prepared to go further than this toward liberalizing the rule, for example abolishing this restriction altogether, which a number of parties urged. There is merit in the NAITP observation that such a course would simply mean curbing current network shows in favor of old network shows, with a corresponding decline in any new program production, either network or first-run syndicated. Considering the substantial impact on new material which this would have, it does not appear that it should seriously be considered. 43/

107. Sports runovers. The general rule structure adopted and discussed above makes somewhat easier the problem of dealing with straight late-afternoon "sports runover" situations, e.g., football games starting at 4 p.m. E.T. and usually, but not always, ending by 7. Since the 7-7:30 p.m. period is no longer subject to restrictions, this becomes less of a problem. However, if the objectives of the rule are to be properly served, we also believe it desirable to insure a higher degree of protection from impingement for the remaing portion of "cleared" time, the 7:30-8 p.m. E.T. period, than that which has prevailed up to now for the preceding half-hour. Accordingly, the formulation adopted in Appendix A is that sports runovers of late afternoon games will not be considered "network programing" if the game was scheduled so that in normal course the telecast (including post-game shows, if any) would have been over by 7 p.m. E.T. We realize that no rule will prevent all runovers -- triple overtime basketball, 13-inning World Series games, an hour's weather delay in a golf tournament, etc. -- but this should eliminate all but a very few of them. Since the networks have been following such scheduling arrangements in the past, this should present them with no difficulty.

43/ With the more liberal provisions adopted, it appears that it will no longer be necessary to consider further "off-network" waivers for particular programs, once the rule goes into effect. This ad hoc process presents some difficulties and dangers.

108. The "time zone difference" problem. This subject, discussed in pars.51-52 above, acquires a new aspect in light of our decision to tie the access period to a certain time of the evening, 7:30 p.m. E.T. and P.T. (6:30 p.m. C.T. and M.T.). This means that not only will these Western situations arise in connection with the Academy Awards program and similar events, which start at 10 p.m. E.T. and are preceded in the East by two hours of network programs; they will also occur with every evening network sports event originating in the East. For example, a World Series game starting at 8 and running until 11 E.T. (5 to 8 P.T.) will preempt the access period that evening for Mountain and Pacific time zone stations, and therefore the station will not be able to comply with the rule if it carries the game. These much more numerous situations have not been a problem under the present rule, since, when the network presents a sports event at 8 p.m. E.T., normally it presents no other network material that evening. But with the rule in its changed form, the situation will occur fairly often, for example with NBC's 15 or so regular Monday night baseball games (plus the All-Star game and up to three World Series evening games) and ABC's 13 or 14 Monday night NFL games, which start at 9 p.m. and are preceded in the East by one hour of network material. All told, taking into account "special events", the total could be as much as 25 times a year for a given station under present scheduling patterns.

109. Clearly, it would not be in the public interest to forbid carriage of the games themselves. The question is whether stations doing so, during one of the access period 7:30 slots, should be required to "clear" a corresponding half-hour later that same evening. We conclude that this should not be required, as a matter of regulation; the rule as adopted states simply that these occurrences are not considered to be "network programing" for the purpose of Section 73.658(k). There are too many complexities to warrant the formulation of an iron-clad rule, including the desirability of permitting the presentation later in the evening of network news when it has been preeempted by these events at its usual time, and some variations in network practices with respect to filling the time after the sports or other special event. However, in situations where the network does not present material for the West after the event, and where therefore these stations have considerable prime time at their disposal, we expect that some of it, at least, will be devoted to the type of material which it is the purpose of the rule to promote, local or first-run-syndicated programing.

110. "Summer Olympics" situations and pre-game shows. We are adopting herein the suggestion of the parties that when a network devotes all or substantially all of its prime time to a certain type of special programing, use of the additional half-hour between 7:30 and 8 for that purpose should also be permitted (the "Summer Olympics" type of situation, which all commenting parties agreed should have been the subject of waiver). The chief problem in this connection is what should be considered "special" programing, particularly as to evening sports events -- fairly common, as noted above -- and movies, e.g., a four-hour presentation such as The Ten Commandments. If left without limitation, it would be fairly easy for the networks to arrange their schedules so as to include such programing to an extent which would be an inordinate impingement on the availability of the access period to non-network sources. Likewise, it appears undesirable to attempt to define exactly all of the kinds of material, sports events, etc., which would warrant such treatment. Accordingly, we limit the exemption on this basis to: (1) international sports events (Summer and Winter Olympics, and perhaps some others such as Pan-American games, (2) New Year's Day bowl games (an established situation) and (3) other network programing of a "special" nature which is neither sports events nor motion pictures.

111. Pre-game shows. Some past waiver requests, chiefly by NBC in connection with the baseball All-Star game and the World Series, have involved the presentation of pre-game shows starting at 7:30, before the game itself starting at about 8. In our view, it is appropriate for the new rule to provide for such programing, but only to a very limited extent. It appears that the best way to approach the matter is simply to specify a number of times each year which each network and its affiliated stations will be permitted to present pre-game shows during the "cleared" time periods, rather than attempting to list events which appear important enough to warrant this departure from the general rule. Five each broadcast year appears an appropriate number, which, in the case of NBC, would accommodate three evening World Series games plus the All-Star baseball game plus one other event.

112. Changes in determination of top 50 markets. We are not adopting herein certain suggestions advanced during the oral argument by the representative of one multiple owner (The Outlet Co., with stations in Orlando, Providence, San Antonio and Syracuse) concerning the determination of what are the top 50 markets each year. One suggestion was that our ranking should use ARB's "area of dominant influence" (ADI) figures and ranking, rather than "prime time households" as at present. The former was said to be the basis used by advertisers. The other was that the ranking, according to any given year's list, be effective further in the future rather than the next season; for example, our current list should be effective only at the beginning of the 1975-76 season. This would give stations additional lead time in planning when they come into the top 50 for the first time, and they would already know, when in, how long they will remain. The first point would make very little difference (one in terms of 1974-75 listings; Syracuse is out and Orlando-Daytona Beach back in under either). The second matter does not appear to represent a major problem, considering the small number of changes which occur each year (two between 1973-74 and 1974-75, with Syracuse and Toledo dropping out and Orlando-Daytona Beach and Salt Lake City re-entering). In view of the complexities which might be involved, and the fact that these suggestions were raised for the first time quite late in the proceeding, they are not appropriate for consideration here. These questions may be raised by separate petition for rule making if a party wishes to do so.

113. Effective date. We have concluded that essentially as far as the basic changes involved are concerned, the rule should be made effective as of the fall of 1974. In order to avoid the need for temporary readjustments lasting only a few weeks (which have been the subject of waiver requests in the past) we are providing, rather than October 1, an effective date of "the date between September 1 and October 1 which the station's primary network designates as the start of the fall season". Generally, this will be a Monday. Our reasons for picking a date some 8 months away -- rather than the much longer time requested by CBS, or the more immediate effectiveness urged by the "majors" -- are that this appears to be the most satisfactory resolution in light of all of the circumstances and the nature of the changes made. Clearly the public interest is served by making improvements in any rule effective at a reasonably early date, and we cannot agree with CBS that so much lead time is necessary in view of the limited expansion of network programing which we have decided to permit. On the other hand, we believe that an earlier date would create confusion and possibly work a hardship on some parties. The 8-month period thus allowed appears adequate for all parties to make plans and preparations in light of the fairly small changes which have been adopted. Pending the effectiveness of the amendments adopted herein, the present rule remains in effect and must be complied with.

114. In reaching this conclusion, we have considered a "Petition for Clarification" filed herein on December 14, 1973, after our November 29 Public Notice of instructions to the staff to prepare a document amending the rule essentially as set forth herein, by two of the most vigorous supporters of the Rule, National Association of Independent Television Producers and Distributors (formerly NAITP), and Association of Independent Television Stations, Inc. This pleading, while initially asking that our public announcement be clarified by the specification of an effective date for the new rules (not mentioned therein), is chiefly devoted to argument that the date should be the beginning of the 1975-76 season, or about October 1, 1975. It is urged that the issuance of the public notice has created confusion and paralysis, both because of the uncertainty of the effective date and as to whether the rule adopted will be exactly the same as that outlined in the public notice. It is stated that affiliated stations are refusing to buy until they know for sure what they and their competitors will be able to carry and how much first-run syndicated product they will need; independent stations are similarly afraid to move because of uncertainty as to what they must program against on affiliated stations or even what programs will finally be available to them; and in both cases the weight of this paralysis falls on independent producers, who are thus unable to sell their material. It is argued that the only way to remove the uncertainty as to the coming season is to state clearly that the new rules will not become effective until fall 1975; otherwise, with the inevitability of petitions for reconsideration (and likely modifications at least in minor respects as a result thereof), and of court appeal lasting into 1975, there will be only an illusion of certainty if the Commission issues now a decision effective this fall, and it is virtually certain that a stay of an October 1974 date will occur, either from the Commission or from a reviewing Court. Meanwhile, however, considerable damage from the present uncertainty would have been done; therefore the Commission should recognize the realities and itself impose now a year's delay. 44/

44/ No specific details in support of the general assertions are given, but it is stated that this is for reasons of confidentiality, and if requested NAITPD will supply information as to station non-renewal or refusal to purchase, on a confidential basis.

115. It is also claimed that a fall 1974 effective date would in effect contribute chiefly to the use of cheaper off-network re-runs, since the networks have stated that they need greater lead time before increasing their programing (e.g., CBS urges the fall of 1975), and first-run syndication production efforts will be to some extent diminished by the uncertainty (further hurting production activity in a recession period) so that there will often be little choice except to use off-network material. Producers of new one-hour programs, it is said, are particularly affected. This would inter alia, hurt independent stations, by the siphoning of off-network material to their affiliate competitors and also by putting them in a second choice position as to scarce first-run product. These parties also urge that the Commission should follow the example of its earlier handling of the rule, making it applicable only some 17 months after its adoption (May 1970 to October 1971) and then giving an additional year for stations to run off-network material in the access-period. A greater grace period here is said to be a fortiori, since here it is a matter of re-runs replacing new material rather than vice versa. Lastly, the matter of equity is claimed -- that many independent producers have in good faith prepared new material for syndication in this fall's season, and are suffering economic damage from the uncertainty. In sum, it is said, equity, the public interest and precedent all dictate an effective date no earlier than fall 1975.

116. We do not find in these arguments reason to delay the effective date of the rule changes longer than until this fall, whatever date in September 1974 the station's network selects as the start of its fall season. As mentioned above, the rule is in effect a restraint, whose maintenance to the full extent it now exists we cannot find to be justified. Therefore it is appropriate to lessen the restraint at the earliest date consistent with the need for reasonable advance planning. The period of some eight months from this decision should be sufficient for that purpose, or, for that matter, the period of roughly five months which should elapse between any decision on reconsideration and the effective date. Appeals to Court may of course delay the ultimate finality of the decision, but in view of the compromise nature of the changes adopted, it is far from certain at this point who the appellants (if any) would be, or what kind of stay would be sought or would be appropriate if requested. In our view, any further delay on our part, if it should ultimately be appropriate, should be granted only after we have had a chance to consider the matters raised on reconsideration (which may, of course, raise this point as well as substantive matters). Moreover, as mentioned earlier, the changes

adopted herein are basically not great. As to additional network programing, this may be only up to one hour on one night a week as far as the time the networks have used up to now is concerned. The other significant change here is the removal of restrictions on the 7-7:30 p.m. half-hour; but, as mentioned above, some 90% of stations subject to the rule devote this time Monday through Friday either to news or to stripped game-show programs most of which were in existence before the rule and shown in this time period to some extent. The petition states that the new rules will not provide any one-hour access slots; but in practical terms this is really a significant change only as to Saturdays (the networks all begin their Sunday programing at 7:30 E.T.). We adhere to the view expressed, that the reasonably prompt removal of the restraint involved is appropriate.

117. Interim procedures pending effectiveness of the rule changes. Pending the effectiveness of the new rules this fall, we contemplate that in general the administration of the rule should proceed as it has up to now, with generally the same treatment of waiver requests relating to operation during this interim period (often, these may be handled by staff action under the expanded delegation of authority to the Chief, Broadcast Bureau, which was effective November 13, 1973; see Sec. 0.281(b)(7) of the Rules). We note two areas in which requests have recently been made and in which waiver appears appropriate if similar requests are received in the future, particularly in light of our determination herein that the maintenance of strict restrictions on use of the 7 p.m.(E.T.) period is no longer appropriate. 45/ These are:

(a) Sports runover waivers for network coverage of golf tournaments, where the coverage is scheduled to conclude by 7 p.m. E.T. but a tie and "sudden death" playoff, or weather delays, or a combination of both, may make it run later; and

(b) Permitting stations to carry network news at 7 p.m. E.T. or P.T. (6 p.m. C.T. or M.T.), without its counting toward the three hours of permissible network prime-time programs that evening, and without the requirement that it be preceded by a full hour of local news or public affairs programing, on evenings when the station's regular network news time during the previous hour is preempted for a sports or other special broadcast (network or non-network).

45/ We do not here pass on two other pending waiver requests, which might involve impingement on the availability of prime time to a larger extent: One is a petition for reconsideration of our deferral of waiver for the off-network program Animal World; the second is by a station for waiver to permit regular presentation of the ABC public-affairs program The Reasoner Report, during prime time on Saturdays, when followed (but not preceded) by a half-hour local public-affairs program. Decision on these will be forthcoming in the very near future.

118. Consideration of the rule in the future. As noted above, many of the proponents of the rule urge that it needs some certainty in order to achieve its potential, and a number of them urge that the Commission give some assurance that the rule, as modified herein, will remain substantially as is for a number of years (two, three or five years are suggested).

119. While we recognize the desirability of certainty in this respect, it is very difficult for this or any other similar agency to give assurances of the sort requested. The Commissioners who have participated in the decision obviously cannot bind others who may be appointed in the future; nor is it necessarily appropriate to bind ourselves to a given course of action or non-action under any and all circumstances. However, certain facts are apparent. This proceeding has taken nearly 15 months to resolve from the date of the Notice, including two rounds of comments, later written submissions and two long days of oral argument, and intensive Commission consideration this past fall and early winter. With the very many other important, complex and pressing matters now before us, it is not anticipated that another look at the prime time access rule will be taken in the immediate future, nor that, if and when the matter does receive further consideration, resolution will be within a brief period from the commencement of the proceeding.

120. Authority for the rule changes adopted herein is contained in Sections 1, 2, 4(i), 301, 303(b), (f), (g) and (i), and 313 of the Communications Act of 1934, as amended.

O R D E R

121. In view of the foregoing, IT IS ORDERED, That:

(a) Effective September 1, 1974, Section 73.658(k) of the Commission's Rules, the prime time access rule, IS AMENDED, to read in its entirety as set forth in Appendix A hereto.

(b) The "Petition for Clarification" filed on December 14, 1973, by National Association of Independent Television Producers and Distributors and Association of Independent Television Stations, Inc. IS GRANTED to the extent that an effective date for the new rules is adopted, and in all other respects IS DENIED.

(c) The waiver exempting "one-time" network news and public affairs programs from the three-hour limitation now in Section 73.658(k), last granted in FCC 73-888 (released August 31, 1973) until a period 30 days after release of this decision, IS EXTENDED to the date in September 1974 which each network designates as the start of its new season.

(d) Petitions to correct the transcript of oral argument held July 30-31, 1973, filed by the following parties ARE GRANTED:

Boston Broadcasters, Inc.
National Association of Independent Television Producers
American Broadcasting Companies, Inc.
Westinghouse Broadcasting Company, Inc.
Goodson-Todman Productions
National Broadcasting Company, Inc.
Columbia Broadcasting System, Inc.

122. IT IS FURTHER ORDERED, That this proceeding, Docket 19622, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

Attachments

NOTE: This rule amendment will be covered by T.S. III(72)-4.

* See attached statements of Commissioners Burch, Chairman, Reid, and Wiley.

APPENDIX A

Effective September 1, 1974, paragraph (k) of Section 73.658, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Evening programming requirements. The provisions of this paragraph apply to stations in the top-50 U.S. television markets (see NOTE below) which are regular affiliates of, or commonly owned with one of the three national television networks (as defined in paragraph (j) of this section), with respect to their evening programming starting on the date between September 1 and October 1, 1974, which their network designates as the start of its "new season".

(1) After such date in September 1974, each station shall devote not less than six (6) half-hours between 7:30 p.m. and 8:00 p.m. E.T. and P.T. (6:30 and 7:00 p.m. CT and MT) Monday through Saturday to programs which are not network, off-network or feature film; Provided, however, That;

(i) one (1) of these six (6) half-hours each week may consist of children's specials, documentaries or public affairs programming, either network originated or off-network.

(ii) "Documentary" programming means any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants.

(2) The following types of material are not considered "network programming" for purposes of this paragraph, so that they may be presented without limitation during the Monday-Saturday time periods mentioned in subparagraph (1) hereof:

(i) "Runovers" of sports events carried on the network during late afternoon or early evening hours, if the telecast of the event (and accompanying pre-game and post-game material, if any) is scheduled so that in the normal course it would be concluded by 7:00 p.m., ET.

(ii) For stations in the Mountain and Pacific time zones, the "live" broadcast of any "simultaneous" network programming, such as sports events or some other special events, which are broadcast simultaneously throughout the 48 contiguous states; provided the network's schedule for the evening including such telecasts complies with the provisions of this paragraph with respect to stations in the Eastern and Central time zones.

(iii) Telecasts of an international sports event such as the summer or winter Olympic games, New Year's Day college football games, or any other network programing of a "special" nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T. (7 p.m. C.T. or M.T.) the same evening to the same programing, or all of it except brief incidental "fill" material.

(iv) "Pre-game shows" in connection with important sports events carried by the networks (e.g., the World Series), on no more than five occasions per broadcast year.

(v) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programing related to such events, and political broadcasts by or on behalf of legally qualified candidates for public office.

(vi) Material carried on a commercial or other network other than the three national networks as defined in paragraph (j) of this section.

(3) For those portions of the Eastern and Central time zones where "daylight saving time" is not observed for part or all of the year, during the portion of the year when it is not observed, the times which must be "cleared" of network, off-network and other feature film material shall be one hour earlier than those specified in subparagraph (1) of this paragraph, except for stations which regularly delay network evening programs and rebroadcast them an hour later.

NOTE: For the purpose of this paragraph, the "top 50 U.S. television markets" are the 50 largest markets, in terms of average prime-time households, listed each year by the American Research Bureau (ARB) in its publication Television Market Analysis. Shortly after this publication is issued, the Commission will issue a public notice setting forth the top 50 markets as indicated in that publication. This listing will apply for the following "broadcast year", that period of about twelve months starting the following September on a date which each network designates as the beginning of its "new season".

APPENDIX B

Parties participating in the proceeding by filing formal material or participating in oral argument

This Appendix lists the parties who participated formally in the Docket 19622 proceeding, either by formal filing of material or in oral argument. There are listed first those parties filing initial comments (with an indication of their later participation, if any), then the additional parties filing reply comments (with a similar indication as to later participation), and then those participating in the oral argument without having filed regular initial or reply comments. After the names of TV licensee parties (except the three national networks, and some other parties, such as certain major film producers, whose main interest in the proceeding did not appear to be as licensees), there are listed the cities in which their stations are located. "Ind." following the city indicates that the station is independent; otherwise it is network-affiliated.

In addition to the written material covered herein, a substantial number of letters and other informal submissions were received and have been included in the docket herein.

I Parties filing formal initial comments through about January 15,1973

Name	Later Participation			
	Reply Comments 3/73	Oral Argument 7/73	Written Material after 3/73	1/
Networks				
American Broadcasting Companies,Inc. (ABC)	X	X	X	
Columbia Broadcasting System,Inc. (CBS)		X		
National Broadcasting Company,Inc. (NBC)	X	X		
Associations				
National Association of Independent Television Producers (NAITP)	X	X	X	
Association of Independent TV Stations,Inc.	X	X		
ABC Television Affiliates Association				
CBS Television Affiliates Association	X	X		

1/ The later written material covered herein does not include various pleadings directed to the July 1973 oral argument, material submitted during oral argument by some of the participating parties, nor material filed later by the three networks concerning their own production activities and use of their production facilities.

I Parties filing formal initial comments (continued)

Licensees 2/ who are also program suppliers	Reply Comments 3/73	Later participation: Oral Argument 7/73	Later participation: Written Material after 3/73
Metromedia,Inc. (Cincinnati,Kansas City, Minneapolis-St.Paul, Los Angeles, New York, Washington, all ind. except Kansas City) and Metromedia Producers Corp.	X	X	
Westinghouse Broadcasting Company,Inc. (Baltimore, Boston, Philadelphia, Pittsburgh, San Francisco)	X	X	
Other TV licensees			
Boston Broadcasters,Inc. (Boston)		X	
Broadcast-Plaza, Inc. (Hartford)			
Corinthian Broadcasting Corp.(Fort Wayne, Houston, Indianapolis, Sacramento,Tulsa)			
Fisher's Blend Station,Inc. (Seattle)			X
General Electric Broadcasting Co.,Inc. (Denver, Nashville, Schenectady-Albany-Troy)	X		
Gross Telecasting,Inc. (Lansing, Mich., La Crosse,Wis.)			
KOOL Radio-TV,Inc. (Phoenix)			
Newhouse Broadcasting Corp. (Birmingham, Harrisburg, St. Louis, Syracuse plus satellite, 50% of Portland,Ore.)			
Palmer Broadcasting Co. (DesMoines and Davenport,Iowa)			
Peninsula Broadcasting Corp. (Hampton-Norfolk, Va.)			X
Southern Minnesota Broadcasting Co. (Rochester,Minn.)			
Time-Life Broadcast,Inc. (Grand Rapids)			
Turner Communications Corp. (Atlanta ind)			
WBRE-TV, Inc. (Wilkes-Barre/Scranton)		X	
WHTN-TV,Inc. (Huntington-Charleston,W.Va.)			
Seven licensees joining in "Summary Comments" 3/			

2/ Parent and subsidiary companies are counted as one "licensee". The listing of cities where these parties have stations includes only those stations and cities mentioned in the comments.

3/ Chronicle Broadcasting Co., Clay Broadcasting Corp.,Griffin Television,Inc., Leake TV, Inc., Rust Craft Broadcasting of New York,Inc., Screen Gems Stations,Inc. and WBEN, Inc., with stations in San Francisco, Wilmington (N.C.), Wichita Falls (Texas),Oklahoma City, Little Rock, Tulsa, Rochester (N.Y.), New Orleans, Salt Lake City and Buffalo.

I Parties filing formal initial comments (continued)

	Later Participation		
	Reply Comments 3/73	Oral Arguments 7/73	Written Material after 3/73
Major film producers			
MCA, Inc.	X	X	X
Paramount Pictures Corp.			X
Screen Gems Division of Columbia Pictures, Inc.	X	X	X
Twentieth Century-Fox Television		X	X
Warner Bros. Inc.	X	X	X
Other program producers and syndicators			
Firestone Program Syndication Co.			
The Fremantle Corp.			
Goodson-Todman Productions		X	
QM Productions			
Samuel Goldwyn Productions 4/			
The Wolper Organization, Inc.	X	X	
Wrather Corporation			
Union, guild and actor agency groups			
Screen Actors Guild, Hollywood AFL Film Council, Writers Guild of America West and Composers and Lyricists Guild (joint comments)		X	
Independent Casting Television			
Other			
American Civil Liberties Union		X	

II Additional parties filing formal reply comments

Major Film Producers			
Metro-Goldwyn-Mayer, Inc. and United Artists Corporation (joint comments)		X(MGM) 5/	
Other program producers			
Daniel Wilson Productions			
Ronox Productions, Inc.			

4/ This party's comments related to its position as a lessor of production facilities.

5/ MGM did not actually participate in the oral argument because of illness, but a statement by its executive vice-president was read into the transcript.

III Additional parties participating in oral argument

Name	Also filed written material
Network	
Hughes Sports Network, Inc.	
Association	
National Committee of Independent Television Producers and member producers Bud Yorkin and Lee Rich	X
TV Licensees	
Post-Newsweek Stations, Inc. (Washington, Miami, Jacksonville)	
The Outlet Company (Orlando-Daytona Beach, Providence, San Antonio, Syracuse)	
Wometco Enterprises, Inc. (Miami)	
Program producers and syndicators	
Phillips Productions, Inc. (Joseph Cates, NAITP member)	
Youngstreet Productions (Nick Vanoff, NAITP member)	
Tomorrow Entertainment, Inc.	
Viacom International, Inc.	X
Worldvision Enterprises, Inc.	X
Union and guild groups 6/	
Film and Television Coordinating Committee	
National Conference of Motion Picture and Television Unions	
Other parties	
Action for Children's Television	
Adam Young, Inc.	
Dr. Bernard Gifford (of New York City-Rand Institute, but appearing for himself)	
Clarence Jones, Amsterdam Evening News	
Cleveland Amory	
National Citizens Committee for Broadcasting	
Paul Kline, Computer Television, Inc.	
Robert R. Nathan Associates, Inc.	

6/ The four spokesmen for the Film and Television Coordinating Committee also represented union groups which had filed comments earlier. The National Conference of Motion Picture and Television Unions, which includes five unions and is concerned with national rather than local Hollywood-area matters, was represented by four spokesmen, its coordinator and officials of three of the component unions, IATSE, IBEW and NABET.

APPENDIX C

Material in the comments and oral argument concerning access-period programing.

This Appendix contains data from the comments and other filings in Docket 19622 concerning access period, and to some extent other prime-time programing, as well as some Commission staff analyses on various subjects.

Pages 1 and 2 are taken from the "Further Supplemental Joint Appendix" filed by the major film producers in September 1973, which contains new data for 1973-74 in addition to material from their earlier "Joint Appendix" for prior years. These filings have not been questioned as to their accuracy, although some of the proponents of the rule strongly objected to some of the assumptions and methods used, such as emphasizing time devoted to various programs rather than the programs as such, including the 7-7:30 period as well as the later half-hour which is the actual network cutback, and allegedly misleading use of percentages of "access entertainment programing" rather than of total access time (the latter would be about a third lower). The Commission staff has checked the data and finds that it is at least reasonably accurate, and it is much the most complete of any of the showings submitted. 1/

The two tables are presented for the figures contained, not for the material at the top, particularly on Table II, which is the "majors" own comment on the figures, with which we do not necessarily agree.

1/ If there are errors, they are not necessarily in favor of the majors' position. For example, while the majors argue that local programing has increased little under the rule, their figure of 135 half-hours in 1972-73 is among the highest of the commenting parties.

This table analyzes, by broad type, those programs scheduled in the 3rd year -- '73-'74 -- of the prime time access rule. Prior to the rule, network entertainment programming occupied 1137 half-hours, or 54.1%, of "access time."

For '73-'74, syndicated entertainment programming occupies 1382 half-hours or 66.8% of the total. News, local-interest programs, and movies are scheduled in the balance of "access time."

Table 1

1973-74

TOTAL ACCESS PROGRAMMING BY TYPE 2/

	# half-hours		%	
1970-71 season before rule (network programming)		(1137)		(54.1)
1973-74 season				
Entertainment	1382		66.8	
(Top 23 entertainment programs)		(1132)		(54.7)
News (local and network)	475		23.0	
Local interest (non-news)	145		7.0	
Movies	66		3.2	
Total Access Programming	2068		100.0%	

2/ For 1970-71 (before the rule) and 1972-73, the corresponding data in the majors' "Joint Appendix" is as follows (half-hours): 1970-71: entertainment 1537 (network 1137, off-network 268, made for syndication 132), news (local and network) 457, local sports and other 44, movies 62. 1972-73: entertainment (syndicated) 1383, total news 488, total local interest 135 (including 5 "Black interest"), movies 94.

This table analyzes program types, before and since the rule.

For '73-'74, the third year since the rule began, the average viewer will again have a very narrow choice of entertainment programming. About 55% of all entertainment half-hours are game shows, a fivefold increase from 11% in the year before the rule. Meanwhile, those entertainment programs with the highest degree of social relevance -- comedies (like "Sanford & Son," etc.) have declined from almost 22% to under 7%; and dramas ("The Waltons," etc.) have declined from over 46% to under 12%. In addition, as prior filings indicated, the majority of even that small amount of drama in access is produced abroad, with minimal social content relevant to American life.

Table II

FOUR YEAR COMPARISON OF ENTERTAINMENT PROGRAMS, BY TYPE

	1973-74		1972-73		1971-72		1970-71	
	# half-hours	%	# half-hours	%	# half-hours	%	# half-hours	%
GAME	758	54.8%	672	48.6%	294	22.8%	170	11.1%
DRAMA	160	11.6	228	16.5	357	27.7	712	46.3
VARIETY	194	14.0	255	18.4	225	17.5	265	17.2
NATURE/ TRAVEL	146	10.6	98	7.1	81	6.3	36	2.3
CARTOON	25	1.8	59	4.3	2	0.2	--	--
COMEDY	91	6.6	24	1.7	242	18.8	334	21.7
MISC.	8	0.6	47	3.4	86	6.7	20	1.3

Use of Foreign-Produced Material

The "majors", and other opponents of the rule, emphasize the extent to which foreign-produced material is used in access time under the rule. This rose from practically none in 1970-71 (before the rule) to 281 half-hours in 1972-73 entirely foreign-produced (20.3% of access-period entertainment program time), of which 244 half-hours were "off-foreign network". The increase was particularly notable in dramatic programing, 74.2% of which in 1972-73 (in terms of time devoted to it) was of foreign origin (Police Surgeon, The Protectors, Evil Touch, etc.). This percentage is probably even higher in 1973-74, with the demise of the Young Dr. Kildare program.

However, overall, it appears that foreign-produced material has declined somewhat in 1973-74, with only 197 of station half-hours devoted to "off-foreign network" programs, compared to 244 half-hours in 1972-73. Also, the networks have used foreign material in prime time in the past (Metromedia refers to 16 examples) and still do; there was mention in the oral argument of 7 such situations (although most of these were specials rather than regular weekly series).

Use of "network re-treads"

The majors et al also refer to the great bulk of syndicated access-period programing as "network retreads". While this term is used too broadly to be truly meaningful as such (since practically all entertainment programing is to some degree "derived" from something earlier), nonetheless a great deal of material is revivals or continuations of foreign network series, or, in the case of some successful game shows such as Let's Make a Deal, The Price is Right and Hollywood Squares,"sixth episodes" of programs currently stripped on the networks on weekdays. Of the top 25 access-period programs in 1972-73 in terms of station time devoted to them, 6 were foreign-produced, three were "sixth episodes" of daytime network game shows, and 12 were continuations or revivals of former network series (Kildare, Lassie, Wild Kingdom, Lawrence Welk, Hee Haw, Merv Griffin, and six game shows, 4 of them generally stripped). The other four -- George Kirby, Mouse Factory, Parent Game and Wait Till Your Father Gets Home -- have less specific origins in former network shows. The top 23 programs in 1973-74 include 13 of the above and 10 new ones; of the 10 new entries, 3 are foreign, 3 are present or recent daytime network game shows, and four have less specific antecedents (the latter are Dusty's Trail, Ozzie's Girls, Bowling for Dollars and Wild, Wild World of Animals. 3/

3/ In setting forth these figures, we recognize of course the argument of the proponents that the public interest is served by the operation of the rule in permitting the continuation of programs, such as Lawrence Welk, which are quite popular even though their demography no longer fits the network's ideas at a particular time and therefore the network cancels the program.

Local Programing

As to the amount of local programing on top-50-market affiliated stations during the one-hour access period, the majors' Joint Appendix showed, for a week in the fall of 1972, a total of 130 half-hours of local material of a general nature other than news and movies (sports, etc.), plus 5 half-hours of "Black interest" material, programs identifiable as such by their title (this is probably an understatement). The first figure is a considerable increase from 44 half-hours in a similar week in 1970, but a decrease from 164 half-hours in a week in the fall of 1971. The "Black interest" figure is an increase from nothing in 1970 and three half-hours in 1971. The 1973 figure is 145 half-hours total (no breakdown as to "Black interest").

ABC and CBS also gave overall figures for a week in the fall of 1972, though not for earlier years. ABC gave figures for the total amount of local news and public affairs programs on the top-50-market affiliated stations during the 7:30-8 p.m. (E.T.) time period except Sunday 10:30-11 p.m.E.T. for CBS and NBC affiliates -- 118 half-hours.

The figures showed considerable variation among markets. Boston and Houston showed 11, Dallas-Ft. Worth 9, Chicago, Miami, Sacramento and San Antonio 6, and Milwaukee and Oklahoma City 5. All of these except Boston represent largely the fact that one or more stations in the market have lengthened their local newscasts to an hour; in Boston, the programing is of a more variegated nature, with WCVB in 1972 presenting a different local program each day at 7:30 p.m.

At the other end of the scale, ABC's figures showed no local news or public affairs programs on affiliated stations (during this half-hour) in 11 markets, and only one half-hour in 15 markets, the latter including New York and Los Angeles.

The CBS showing was based on the same 7:30-8 p.m. (E.T.) period, plus a half-hour additional on Sundays, for a week in the fall of 1972. It showed that of 1,190 station half-hours, 149 (12.5%) were devoted to local programs other than public affairs (sports, entertainment, discussion and movies), and 111 to news and public affairs (9.3% of the total hours).

A few other licensee parties made showings as to the access-period programing in their markets, local and otherwise. Westinghouse, for example, showed that in roughly the same time period analyzed by CBS (above), in the 5 markets where it has stations there was a total of 32 local programs on affiliated stations during a week in October 1972 (including 4 regular newscasts but not including movies). These included 13 in Boston, 6 in San Francisco, 5 in Baltimore and 4 in Philadelphia and Pittsburgh. Thirteen of the 32 programs were on Westinghouse stations.

At the oral argument, an official of Viacom International, Inc., one of the proponents of the rule, stated and presented an exhibit showing that as of fall 1973, local programing would be presented during the access period in 44 of the top-50-markets, on 78 stations subject to the rule.

Use of "stripped" material and other "block" programing on weekdays in 46 of the top 50 markets, 1970, 1972, 1973 3/

The following are the figures as to use of "stripped" game shows and other material during the first and second half-hours of prime time, Mondays through Fridays, for weeks in November 1970, November 1972, and October 1973. The news "blocks" mentioned were presented on all five nights; the movie program on ABC stations in Los Angeles and San Francisco ran on four nights (Monday in these weeks was ABC's Monday night NFL game). The other "stripped" material ran usually on five nights, although in up to about a dozen cases per year the station presented a different program on one night, and in one 1973 case two nights.

7-7:30 p.m. E.T. and P.T., 6-6:30 p.m. C.T.:

1970: 20 game shows, 33 off-network programs (mostly comedy such as Petticoat Junction, I Love Lucy or Dick van Dyke show strips, and some drama such as Dragnet), 47 local news, 26 network news, 3 local movie blocks, 1 syndicated (Death Valley Days). Total: 130. Nine stations presented "variegated" programing, basically a different program every night.

1972: 51 game shows, 43 local news, 22 network news, 4 other 4/, 3 movie blocks. Total: 123. 16 stations presented "variegated" programing.

1973: 56 game shows, 45 local news, 21 network news, 2 other, 3 local movie blocks. Total: 127. 12 stations presented "variegated" material.

3/ The 46 markets include all of the 1973-74 top 50 markets except Denver, Phoenix, Greensboro-Winston-Salem-High Point and Wilkes-Barre-Scranton. The first two are excluded because of their Mountain time zone location, where schedules in 1970 before the rule, and to some extent later, are more irregular than elsewhere, so that analyzing a particular half-hour is less meaningful. The last two are excluded because they were not in the top 50 in 1972-73, so there is no basis for comparison. The UHF station in the Grand Rapids-Kalamazoo-Battle Creek market, not yet on the air in 1970, is not included in any of the years. Included are four stations in the Hartford-New Haven market, where two UHF stations are affiliated with NBC. Source: ARB audience survey listings for November 1970 and November 1972 (particularly the second week of each year); and for 1973, TV Guide for the week of October 6-12.

4/ "Other" programing is in most cases the Merv Griffin 90-minute talk show, shown in three markets in 1972 and two in 1973, but which at the oral argument was described by an official of Metromedia (which handles it) as not basically an access-period program. The remainder of this category consisted in 1972 of a 7 p.m. block on a San Francisco station listed as "Wide Wonderful World", which may actually be variegated "outdoor" material rather than a strip; and in 1972 and 1973, half-hour "film" programing at 7:30 on one of the two NBC affiliates in the Hartford-New Haven market.

7:30-8 p.m. E.T. and P.T., 6:30-7 p.m. C.T.

1970: All network (except for a few isolated preemptions) and thus "variegated" programing.

1972: 33 game shows, 7 local news, 3 other, 3 local movie blocks. Total 46

1973: 34 game shows, 11 local news, 2 other, 3 local movie blocks. Total 50

In 1973, in four markets all three affiliated stations were stripping game shows opposite the others in one of the half-hours; in two other markets, there were two stripped game shows opposite eacn other on affiliated stations in both half-hours; and in 17 other markets there were two game shows on affiliated stations at the same time (Source: Further Supplemental Joint Appendix of the major film producers).

Use of "feature film" during the access period

In 1973, three top-50-market affiliated stations present local movies on five weeknights, from 6:30 to 8. These are ABC's owned stations in Los Angeles and San Francisco, and a station in Hampton-Norfolk, Va. The latter also presents a movie during the access period on Sunday. In 1970, the ABC-owned stations also presented movies on weeknights, but from 6 to 7:30; the Virginia station has programed in this fashion only since the rule.

Another 15 top-50-market affiliated stations present local movies one night a week (or in one case two) during "access-period" hours (including a few late Sunday night). This does not include two which present them ending at 7:30

Use of Syndicated Material by "O & O" Groups

One of the arguments urged by opponents of the rule is that it has not diminished network control and dominance, for one reason because of the vital role the three 5-station groups of network-owned stations play in the success or failure of a syndicated program. It is appropriate to inquire into the extent the stations, in these three groups, actually program their access periods with the same material as other stations in the same group. Set forth below is data for 1972-73 and 1973-74, using ARB rating survey program listings (for the second week in November 1972) for the first, and TV Guide, week of October 6-12, 1973, for the second. As can be seen, the stations in each group do use the same material to a considerable extent, though never entirely so and somewhat less in 1973 than in 1972.

ABC - 1972: the five ABC-owned stations in the 1972 week presented a total of 24 access-period programs on the 5 stations, representing 12 different programs (one, shown on two stations, was one hour; the rest were half-hour). 5/

Two programs were shown on all 5 stations, one on four, one on two, and 8 on one station only. Thus, of the 24 station program units, 42% were devoted to programs shown on all stations, 67% devoted to programs shown on two or more stations, and 33% to single-station programs. In terms of separate programs, 8 of 12 were used on one station and 4 on more than one.

1973: The 5 stations in the 1973 week showed a total of 23 access-period syndicated programs, including 14 separate programs. One was shown on all 5 stations, one on three, three on two and 9 on one station only. Of the 23 station program units, 61% were programs shown on multiple stations, 39% were shown on one station only. Of the 14 separate programs, only 5 were used on multiple stations, and 9 on one only.

5/ In the case of ABC's Los Angeles and San Francisco stations, there is included here the non-network material they present on Mondays following the ABC NFL football game which preempts the usual access-period time. In both cities for both years, this was the Department S syndicated program.

CBS - 1972: The 5 CBS stations showed a total of 35 syndicated programs in the access period, including 10 separate programs (one one-hour, the rest half-hour). Five programs were shown on all 5 stations, two on three stations, one on two, and two on one only. Thus, 71% of the 35 station program units were material shown on all stations, 94% of it was material shown on two or more stations, and only about 6% was material shown on only one station. Of the 10 programs, 8 were shown on two or more stations.

1973: The 5 stations presented, in the 1973 week, a total of 30 syndicated access-period programs, including 13 separate programs. None were shown on all 5 stations, 3 appeared on 4 stations, 3 on three stations, 2 on two stations, and 5 on only one station. Thus, 83% of the station program units were material shown on multiple stations, and 17% was material shown on one station only; of the different programs, 8 were used on multiple stations and 5 on one only.

NBC - 1972: NBC has been the most nearly monolithic of the owned-station groups in this respect. In 1972, of a total of 38 syndicated programs presented during the week on the 5 owned stations, 35 represented 7 programs which were on all 5 stations, or over 90%; one program was on two stations and one on one station.

1973: There was a somewhat greater difference among these stations in 1973. The 29 syndicated access-period programs presented during the week on the 5 stations included 8 programs, five on all 5 stations, one on two and two on one only. 6/ Thus, some 86% of the station program units were material shown on all 5 stations, and only about 7% was material shown on only one station. Six of the 8 programs were shown on more than one station.

6/ These 29 program units occupied 39 half-hours of time, including the one-hour Starlost program and two half-hours of Hollywood Squares, both in all 5 markets.

APPENDIX D

SUMMARY OF CERTAIN FACTUAL DATA AND SPECIFIC ARGUMENTS

This Appendix summarizes factual data and specific arguments relating to two subjects. Most of it concerns material submitted in comments; paragraphs 11 and 33-37 relate to material presented at the oral argument, which differs in some respects from that in the comments.

A. Effect on U.S. program production and employment in it.

1. One of the arguments vigorously urged against the rule, and for its repeal, is the asserted serious adverse impact on U.S. program production and employment in it, which is generally put in terms of impact on "Hollywood". The chief parties advancing this argument are the "majors" and the Screen Actors Guild and other labor-guild organizations filing jointly ("SAG et al"); other parties urging the point are Samuel Goldwyn Productions and Independent Casting.

2. These parties assert that the network cutback resulting from the rule has meant a loss in Hollywood production activity of nearly $60 million annually, computed on the basis of slightly over $100,000 production cost per half-hour episode, times 24 episodes per series per year on the average, times 24 half-hours of network programs lost (4 hours per week per network). 1/ SAG et al, using a similar but slightly different basis of computation, put the annual figure at $63 million with $53,550,000 of it being payroll ($106,250 average payroll per episode), representing 16,128 production jobs or 3,570 full time jobs. Either explicitly urged or implicit in these arguments is the position that this loss is not made up to any significant extent by the access-period programing which has resulted under the rule. It is said that this is because this material is very largely either "game shows", involving little production activity and often made on an assembly line basis (and not employing actors in any event), or material produced abroad and thus not helping those actually working in U.S. production (although some American producers are involved and may benefit).

1/ The actual amount of the network "cutback" per week resulting from the rule is either 22 or 24 half-hours a week, depending on what period is chosen as a basis for comparison. In November 1970 -- a period chosen by most commenting parties for comparability with fall 1972 data -- all three networks programmed beginning at 7:30 E.T. 6 nights a week and at 7 p.m. on Sunday, and ran until 11 p.m., 24 half-hours more than they may under the rule. However, early in 1971 ABC cut its Sunday programing back to 8 p.m. so that, immediately prior to the rule, the three networks presented 22 half-hours more than permitted under the rule.

3. SAG et al advance statistics from labor sources as to the assertedly very bad unemployment situation in Hollywood resulting from the rule, the "rerun" situation and other industry problems, both TV and motion picture. As of November 1972, this includes figures for some 20 unions and guilds (including SAG but not AFTRA, which represents actors in tape productions), totalling more than 58,000 employees. The unemployment rates range from 7.4%(film editors, 1,739 total members) to 85% (actors, much the largest of these groups with over 25,000 total members). Other groups of over 1,000 members, and the unemployment rate, included property men (1,884, 23%), studio teamsters (1,087, 39.2%) screen extras (2,645, 75%), and writers (3,000 members, 73%). Percentages for two other groups over 1,000 (musicians 16,000 and directors 1,100) were not known. SAG et al claim that considering that November is the height of the production season, these figures are shocking, and they are even worse during the re-run season.

4. Other parties mention additional data. According to Screen Gems, the decline in production activity represents a loss of 3,800,000 hours of craft-union, "below the line" employment (statistics from the Motion Picture Health and Welfare Fund, showing 31,851,033 such employment hours in 1969-70 compared to 28,021,721 in 1971-72, the earlier figure representing a decline of some 5,000,000 hours compared to the mid-1960's). The "majors" also give figures as to the decline in production of filmed entertainment TV programs over the last decade -- 755 hours and 1,471 half-hours in 1971 compared to 1,530 hours and 3,060 half-hours in 1962), and a reduction in such material during the access period from 898 hours in 1970-71 to 81 hours in 1971-72. However, as ABC points out in supplemental comments (mentioned below), this excludes the large and increasing amount of videotape programming, both network and non-network, including such successful network programs as All in the Family, Maude and Sanford and Son. Samuel Goldwyn Productions, which is a production company and also a supplier of studio facilities to independent producers (mostly for network programs) claims a 25% decline in filmed production activities at its facilities -- said to result from the preponderance of inexpensive programs using tape, or foreign material. It is claimed that this has hurt it and similar companies, and employment.

5. The proponents of the rule -- particularly NAITP, ABC and Metromedia -- urge a number of contentions in rebuttal to such arguments: (1) this is really not an appropriate concern in this proceeding; television is not chargeable with the health of Hollywood, the Commission was not concerned about this when it gave "off-network" waivers particularly for the foreign Six Wives of Henry VIII program, and in its comments in Docket 19554, the Justice Department expressed the view that the Commission's authority to consider unemployment or under-employment in Hollywood is "not clear". (2) this whole argument about "impact on Hollywood" is a myth; there is bound to be more employment with nearly 70 syndicated access-period programs now compared to 21 network programs during these earlier hours as well as increased local programming activity (NAITP uses the figures 4,620 episode-jobs compared to 1,386, on the basis of SAG's formula of 66 persons per episode, assuming the same new-repeat ratios); (3) these syndicated programs have a higher new-repeat ratio than network shows, particularly game shows (1153 of 1560 episodes of 10 game shows are new), so that using the same formula, game shows represent 76,098 episode-jobs compared to 792 for Wild Kingdom's 12 new episodes (or 24,864 if it presented the same number of programs); (4) production everywhere in the U.S. must be taken into account, including both syndicated shows made outside Hollywood, and local productions, and the Commission should also look at the quality of employment -- youth, minorities, women, etc. -- in which the independent producers are better; (5) Hollywood's "crisis" has been overstated, since conditions have improved since about mid-1971, with movie box-office receipts up in 1972 compared to 1971 (20% in gross receipts, 16% in number of admissions), more of the "majors" showing profits and their overall income picture improved by more than $100 million in 1971 over 1970, feature film"starts" up 32% and U.S. "starts" on foreign locations down 17%, and unemployment down in the fall of 1972 compared to a year earlier; 2/

2/ ABC presents figures based on California State unemployment insurance records, showing unemployment declines for all craft and guild categories shown except directors. The figures given are numerically considerably smaller than those shown by SAG et al, for example including only 721 unemployed actors in October 1972, whereas SAG's 85% of 25,000 would be over 20,000. Some of the opponents claim in reply that this is factually ridiculous, based only on claims during a two-week period, and ignores those whose benefits had expired by late 1972, or who, unable to get work, left the industry. NAITP also urges generally that the rule serves as a "shot in the arm" to independent production activity, and will benefit employment by forcing abandonment of archaic practices.

(6) to the extent there still is "depression" in Hollywood from this cause, it represents basically the decisions of the "majors" not to come into access-period production on a non-network basis, which they are free to do and doubtless will soon do if the rule is affirmed; (7) the whole matter is a highly complex one, involving this factor to some extent but also re-runs, increased use of movies (Metromedia claims that in a February 1973 week, 16 prime network hours were devoted to made-for-theatre movies reflecting no TV production activity); "runaway production", declining box-office receipts, and obsolete production and business practices -- many of which factors reflect the basic problem which is high and increasing production costs, which have just about doubled in the last 10 years and are in part a union-caused problem; (8) the practice of foreign importation is by no means confined to access-period material, since the networks have done it on a number of occasions (Metromedia lists 16 in the last several seasons) and about 10% of prime time network schedules is devoted to foreign-produced movies; and, of course, the "majors", with 95% of their production away from Hollywood, are poor parties to urge this point.

6. Material in NAITP and ABC Supplemental Comments (July 1973). As permitted under the Notice of Oral Argument herein, NAITP and ABC filed supplemental comments discussing this subject at some length. NAITP's additional material is largely in the nature of legal argument disputing the relevance of this whole subject; it is asserted that it would be permissible for consideration only if it were shown that program output had declined under the rule, which obviously it has not. Absent that consideration, the matter is not appropriate for Commission evaluation. NAITP claims that since prime-time program output has increased under the rule, what those who raise this issue are really urging is that Hollywood employment be increased at the expense of an increased supply of programs -- clearly inadmissible from the Commission's standpoint.

7. ABC likewise raises the relevancy question, but goes into more detail factually. It is claimed that basically, any assumption that unemployment in Hollywood is caused by the rule, and should be grounds for repealing it, is much too simplistic, in ignoring: (1) effect on employment elsewhere in the U.S., concentrating only on Hollywood, which means generally the "majors" who have not chosen so far to be active under the rule; (2) it ignores other developments in the industry, such as those relating to feature film and the substantial income from TV commercials. ABC claims that while the rule has led to different types of programs, and thus employment shifts as compared to the standard dramatic fare which makes up the bulk of network prime-time material, this does not necessarily mean fewer people. Thus, a game show typically means less employment than a dramatic show,

but a variety show such as Lawrence Welk probably means more, with the large number of musicians, even though, like the game show, it does not represent much income to Screen Actors Guild or Writers Guild members. Also, it is claimed that those advancing this issue tend to ignore completely the increase in employment resulting from more local access-period programming, for example the 14 people added to the staff of ABC's Chicago station to handle its additional five weekly half-hours of news and public affairs material. In short, ABC believes that overall, U.S. employment under the rule has increased. ABC claims that any analysis of this situation must take into account three factors: (1) extensive union "featherbedding" in the industry, which has increased production costs greatly; (2) the increased use of videotape rather than film, which renders some statistics such as those mentioned above of no value; and (3) the rising income from TV commercials (see the discussion of OTP Report material, below). 3/ In sum, ABC urges that, as happens from time to time in many industries, the source of the programs (majors v. independents) and the location of production have changed somewhat, but overall employment has increased rather than lessened, and the Commission should not act simply to preserve for the "majors" a position which they can no longer justify, just as Southern California's other major industry, aerospace, is going to have to adjust with the times.

8. ABC claims also that relief is not necessary because the majors -- having cut their payrolls and film budgets, and otherwise reformed their inefficient practices -- are now doing rather well (citing a Business Week article of June 1973 and other material). The number of planned motion picture "starts" in January and February 1973 was 32, nearly double the 1972 figure, with 12 to be produced in Hollywood. MCA-Universal will have 13-1/2 hours a week of network prime time this year. "Runaway production" is down, with 91 produced-in- U.S. movies in 1972 and 130 or so planned for 1973, compared to fewer than 75 in the 1969-71 period (resulting partially from devaluation). ABC also refers to a trade press article concerning the highly-regarded Black Beauty series, in which the producer ascribes his success to the absence of American padded costs. It is claimed that the rise of independent production may have spurred the "majors" to more efficient and more effective efforts.

3/ ABC asserts that many of the actors used in commercials are not really professionals depending on acting for their livelihood, but nonetheless they must join SAG, whose unemployment figures therefore include them when they are not working at this activity. It is claimed that these figures are to this extent an overstatement of the actual unemployment situation. ABC also suggests that another contributing factor to current Hollywood unemployment may be the economies put into effect by the majors in the last two years or so, both in their film budgets and elsewhere, for example MGM's cutting its payroll by 5,000 people.

9. Material in the OTP Report (March 1973). In March 1973 the Office of Telecommunications Policy published its "Analysis of the Causes and Effects of Increases in Same-Year Reruns Programming and Related Issues in Prime Time Network Television". This report related primarily to the "re-run" question, but contained some analysis relating to the prime time access rule. It was concluded that the rule was one factor leading to increased unemployment in the program production industry, along with re-runs, increased network use of movies, declining theatre admissions and "runaway production". However, it should also be noted that this study covered only the period ending with the 1971-72 year, the first under the rule, when use of "off-network" material during the access period (as well as unrestricted use of movies) was permitted. The study stated that " ... the time in question was devoted almost entirely to non-original programming, replacing original and network re-run programming", and that while it was not clear that this would continue for the future, "it does seem likely that access time will probably be devoted to programs of lower cost and lower employment than network programming." (P.30). The study analyzed CBS network prime-time programming for the 1962-63 and 1971-72 years, and noted a decline of 389 hours in made-for-TV material (regular TV programs and made-for-TV movies). It attributed this decline in roughly equal parts to the increase in made-for-theatre movies (none in 1962-63), 137.9 hours or 35.4%, the prime time access rule (129.9 hours or 33.4%) and increased use of re-runs (121.3 hours or 31.1%). The report also contains a number of other statistics, including the income to entities within SAG's jurisdiction for television programs, movies and television commercials. In 1971, this was $34.0 million for TV (down from previous years), $20.6 million for movies (up from 1970 but down from earlier years) and $59.2 million for commercials (down from 1970), a total of $114.4 million. Thus, more than half of the income to SAG entities is from TV commercials. The income from television programs is less than that shown for AFTRA (which represents, inter alia, actors in taped shows); but the latter, $69.3 million, includes local stations as well as programming personnel.

10. Data advanced by the "majors" in support of their claims of injury. While not directly related to the impact of the network cutback on U.S. program production activity, it is appropriate to note certain data advanced by the "majors" as to their assertedly poor situation generally. It is noted that theatre box-office admissions have declined, between 1946 and 1971, from about 78 million to 16 million a week or $1.692 billion to $1.214 billion annually, which in terms of constant dollars represents in the latter year only $653 million -- a 61% decline.

Sales to television of feature (theatrical) films and short subjects declined between 1970 and 1971 from $94.6 million to $49.3 million; sales of feature films to the networks declined between 1967 and 1970 from $249 million to $47 million. These figures of course do not include sales by these companies to the networks of films "made for television", which rose from 1% of network movies in 1965-66 to 49% in 1971-72 (in the latter year, 13 of the top 15 movies in audience ratings on the networks were made for television). As mentioned in the text of the Report and Order, the "majors" argue vigorously as to the multiple impact on them from various aspects of the rule -- the cutback in network prime-time programing (of which they do a substantial amount), the constriction of the "after-market" resulting from the off-network restriction, and the limitation on the use of feature films in the access period -- all in addition to restrictions against "siphoning" contained in the pay-TV and cable rules, and the problem of diminished theatre receipts.

11. Oral argument material concerning impact on employment. A number of guild and union representatives participated in the oral argument on July 31, making generally the same arguments and factual assertions mentioned above. The annual loss in payroll resulting from the cut in network prime-time production was estimated at $53,500,000, or 16,000 jobs (Chester Migden, SAG's Executive Secretary); others gave higher estimates. It was recognized that some of this is made up by employment in the production of the programs which have replaced network material in access time (first-run syndicated and local), but Mr. Migden stated that because of the nature of the programs involved (foreign product, U.S. game shows, and inexpensive local material in many cases) these gains did not approach the loss figure mentioned, leaving a "net loss" estimated at $25 to 30 million. SAG's unemployment figure was said still to be in the order of 85%, with earnings declining in recent years; up-dated figures for the same guild and union groups mentioned above, as of July 1973, were presented, showing higher unemployment in most cases (lower in a few). It was said that, while there are certainly other factors in the situation, the rule might be the last, back-breaking straw; and that talented creative persons and technicians were continually leaving the industry, resulting in the wasting of a national asset. The cutback in network prime-time programing was said to have particularly affected minority groups, forcing the shelving of network program projects which would have been of particular value to these groups and would have employed members of them (both talent and technicians) in large numbers. The same was said to be true with respect to women, through the cutback in new network situation comedy efforts (a form of programing with which women relate particularly, and which employs them in substantial numbers). Other union officials, concerned with the national scene rather than with "Hollywood" in particular, said that the rule had not helped their situations, and in some ways had hurt, for example a decline in network documentaries hurts cameramen engaged largely in news and documentary work, and employment in Miami TV production is down. It was also said that the networks are better employers to deal with because they are more responsible.

B. Arguments concerning the economic feasibility of presenting "Quality" prime time material via syndication.

12. Arguments and data of opponents. One of the arguments vigorously urged against the rule, by opponents such as the "majors" and NBC, is the asserted impossibility of developing and distributing, via syndication, programming of "network quality". This is said to be true because of the extremely high production costs and risks involved, the "fractionated" market as opposed to total network coverage, and the inherently greater efficiency of the network process, with one sale and one copy of the material compared to "selling" each individual station and having to furnish a large number of prints of each program.

13. As to costs of production, NBC, while admitting it has little experience in producing itself, estimates that currently production costs for network-type programs are at least $100,000 per half-hour episode or $200,000 per hour program, and the Warner Brothers' estimate is about the same. Game shows, they say, can be produced much more cheaply, for $5,000 - 10,000 per program. NBC states that syndicated programs of the same general type as network -- generally dramatic shows -- can be produced for less, such as $40,000 - 60,000 for drama, but the lower figures represent not greater "efficiency" as urged by NAITP, but "a much lower input of production and creative values", or matters such as less money for talent, writers, etc., and differences in production techniques and editing processes. Also, NBC points out that there is very little U.S. dramatic production for the access period, 75% of that kind of material being foreign, with the much cheaper game shows representing a less risky venture for producers and tending to dominate the access-period offerings. Some of the parties stress the risk element involved, with "pilots" costing on the order of $360,000 a half-hour or $600,000 an hour to make, and the majority of them not developing into successful programs.

14. Screen Gems states that its current production costs for network material are about $127,000 per half hour, and to produce the same show for syndication would mean about $140,000, with additional prints, advertising, etc. but not including any administrative or general expense items. It is stated that this kind of money simply is not available in syndication.

15. MCA submitted some cost and revenue figures for individual network programs, including five hour shows sold to the networks for 1970-71, twelve hour shows similarly sold for 1971-72, and three half-hour shows for 1971-72. The figures given include average cost of production per episode, average "distribution expenses" per episode (not identified), gross network revenue per episode, and per-episode deficit as far as the network sale is concerned.

These figures range as follows:

		1970-71 5 one-hour shows	1971-72 12 one-hour shows	1971-72 3 half-hour shows
Production cost:	min.	$227,387	$192,459	$110,127
	max.	278,389	256,667	135,632
Distribution expense:	min.	20,188	18,534	10,733
	max.	31,166	29,818	13,088
Gross network revenue:	min.	195,335	196,538	102,725
	max.	235,167 6/	226,727	108,000
Deficit:	min.	21,877	15,297	20,490
	max.	74,388	76,068	38,654

Thus, there was always a deficit in producing for networks if distribution expenses are included, and in all but three cases (all one-hour) the network revenue did not cover the computed cost of production. The total deficit involved in network sales in these two seasons was $21,797,000, which must be recouped from later syndication sales.

16. MCA also submitted figures as to the syndication of its off-network programs, including the 5 program series put into syndication during the period from January 1968 through March 1971, and including sales through September 1972. These showed per-episode revenues of $35,797 to $114,092, per-episode syndication expenses from $30,739 to $71,062, and syndication per-episode profits of $5,058 to $43,030. These programs are not identified as to length. These amounts are usually less than the amount of deficit from network production referred to in the previous paragraph; but they apparently do not relate to the same programs but to programs which were produced for the networks in earlier years, when costs were lower.

17. MCA asserts that this shows that production of quality material is a risky business even when it is supported by an initial network market, and is impossible without that assistance. It is stated that non-network revenues presently available would have to be multiplied three or four times before such activity would be feasible, to meet the above production costs and also the cost of, or fee for, distribution, which MCA estimates at 35 to 40% of gross for domestic syndication and 40 - 60% for foreign (which would likely be higher for selling efforts involving unknown, not off-network, material). It claims it would have to multiply its sales force by 10 to engage in such efforts (a statement which Metromedia in reply claims is simply ridiculous). Such money is not forthcoming now, and there is no reason to believe it will be in the future. NBC calls attention to its losses of $250,000 to

6/ Three of the five programs were priced at the $235,167 figure.

$350,000 in one unsuccessful access-period show in the 1971-72 year on its owned stations, for which it advanced the financing but which lasted only 14 episodes.

18. NBC mentions the same distribution cost or fee as typical, and one of the items making network distribution inherently much less costly and more efficient. Its analysis of the economics involved is generally as follows: Out of each dollar of non-network advertising revenue it receives, the station typically spends about 27% in direct selling expenses and commissions, leaving at most 73¢ for programming costs (not allowing for overhead, technical expenses or profit). Of this, 26 to 29¢ would go for the distribution of the program after it is produced (the 35-40% mentioned above), leaving 44 to 47¢ for program production costs and the producer's profit, if any. However, it is asserted, actually the amount would be less because of a sum such as 10% of gross revenues which distributors incur and charge for expenses -- prints, shipping, etc. -- so that actually only 37-40¢ would be available for actual program production costs. By contrast, claims NBC, the networks can spend about 64% of their advertising dollars received for program costs; network costs of selling and commissions typically run about 17% of gross revenues, transmission costs on the order of some $60 million annually represent about 4%, and station compensation from the networks is about another 15%, a total of 36%.

19. Some of the opponents of the rule call attention to one of the quotations contained in the comments of one of the proponents (INTV the independent station association), in which one producer states that the average network hour show costs some $250,000 to produce and "There is absolutely no way to recoup that amount of money in syndication." However, the thrust of the entire quotation is the other way; the quotation is as follows:

> It is the barter arrangement that makes the hour shows possible in syndication. We can't sell 'Hee Haw' or 'Hollywood Palace' to stations on a per program basis and come out with a reasonable profit. What makes it happen is the sale of four minutes to national advertisers. This means that we don't have the usual distribution cost. The average hour network show costs $250,000 to produce. There is absolutely no way to recoup that amount of money in syndication. But we can do a $100,000 show in syndication and come out ahead. On a barter basis we'll come out all right. We can get about $30,000 a minute and guarantee them a minimum of 11,000,000 homes each week and make the profits we need to continue.

20. Arguments and data of proponents. Some of the proponents of the rule -- notably NAITP, INTV, ABC, Westinghouse and Metromedia -- vigorously dispute these contentions. It is asserted that production costs can be and are much lower than those mentioned above; NAITP estimates $61,000 per half hour for drama ($27,000 "above the line" for creative elements such as talent and writers, $34,000 "below the line" for facilities, technical personnel, etc.), $43,000 for a variety show and $21,000 for a documentary ($8,000 and $13,000 above and below the line). Westinghouse gives production cost figures (per episode) for the six programs it produced and distributed for use in access time: between $40,000 and $50,000 for Norman Corwin Presents (a dramatic series), between $50,000 and $60,000 for the two David Frost Revue series, and three others under $40,000 (none of these programs is still in production). ABC notes in reply comments that not all of MCA's "network quality" production involves costs of the magnitude mentioned above; it has recently sold to ABC new 90-minute dramatic, anthology-type movies in the $100-110,000 range (for three plays), less than one-third the price of a prime-time 90-minute movie for two plays. Metromedia in reply comments refers to two of its programs, one new syndication this coming season (Quincy's Trail) with a cost in the order of $80,000, and another on ABC costing slightly over $100,000 per episode; it is stated that the programs are essentially of the same cost level but the second is higher because it is for a network. It is asserted that the tremendously successful CBS All in the Family program started in the $55,000 range.

21. NAITP asserts that independent producers can produce a given type of program for 50-60% of the cost which the same material would involve if produced for a network. It is claimed that independent producers are much more flexible, and can produce without having to contribute to the support of a vast network and its people, or subsidize elaborate and somewhat outmoded facilities, which producers working closely with the networks or the "majors" are required to use, often at inflated prices so that the owners can make a profit from such use. In general, it is claimed that independent producers can operate free of the archaic and expensive practices which have grown up in the industry. They are particularly able to save in "below the line" costs, but also in "above the line" costs for talent, etc., because the latter will often work more cheaply for independent producers than for a producer working for a network (to some extent this is because more of the talent are newcomers without the high prices of established stars, but also because they get a 26-week rather than a 13-week commitment, they sometimes get or have the possibility of getting a share in the profits of the program if it is successful, and in a general way they are aware of the differing nature of the syndication production business). ABC and Westinghouse state that "Hollywood production" in the traditional sense is so expensive, with "featherbedding" as well as other burdensome practices, so that an independent producer can operate much cheaply. ABC's reference to the Black Beauty program in this connection has already been mentioned.

22. These parties also dispute the contentions as to the cost of distribution. Metromedia claims that while it would, as a syndication distributor, charge someone else about 35% for distributing his program, this is definitely not true of Metromedia's own programs such as Dusty's Trail. (See the discussion of the Josephs statement below). It is also claimed that MCA's argument about having to expand its sales force 10 times is ridiculous; Metromedia sold its Primus access program in 1971, and will sell Dusty's Trail (plus other material) with only 5 or 6 people. It is also claimed that the selling job may actually be easier with syndicated material than for a network program; there are many more buyers, the producer gets a commitment for 26 weeks instead of 13, and he has more creative freedom. NAITP claims (without specific detail) that the distribution and production costs come from an entirely different "pool" of money, so that more for distribution does not necessarily mean less for production.

23. Some other points are urged. It is claimed by ABC that the syndication market can produce considerably more revenue than it has so far, and that stations will pay higher prices as first-run syndicated programming becomes established. ABC Films experience is to this effect. NAITP claims that by no means all of the top 50 markets have to be sold in order for a profit to be realized, even for a dramatic show; 8 of the top 10 is enough. In overall terms, it is asserted that a dramatic show requires 60 of the top 100 markets, compared to 35 for a documentary and 40 for a variety show. ABC urges that the selling effort and economic base for an access-period program need not necessarily be limited to prime time; of the 58 access-period syndicated programs included in its listing, it shows that 32 were also used by some stations in non-prime time, including 7 with more such stations than prime-time users, and three others with more than 10 non-prime time presentations. Metromedia, discussing the value of first-run syndicated material, asserts that in earlier years, before total network dominance, three of the most successful re-run series were never on a network (Seahunt, Highway Patrol, I Led Three Lives).

24. One of the reply comments, that of INTV, the independent station association, was devoted almost entirely to this subject, including a long transcript of an interview with Mr. Kenneth Josephs, vice president of Metromedia Producers Corp. The comments themselves (aside from the transcript) urge the following points: (1) a substantial number of producers and distributors do not agree with the dim view expressed by MCA et al, and are "prepared to stake their financial and creative futures accordingly."

(2) the "access period" represents a new departure in programming and its economics, using first-run syndicated product where there was virtually none immediately before, and "prime time" was filled with network or off-network product. As stations adjust to the rule, they will be willing to pay the higher prices which can be supported by the larger prime-time audiences and higher advertising rates -- "national volume moving toward levels sufficient to justify expensive first-run production." Examples are cited of four unidentified programs, one selling for $500 in one market before the rule, $750 in the first year, $1,000 in 1972-73 and $1500 for the 1973-74 year; two others jumping from $250 the first year to $650 and $750 the second (and the latter to $1,000 for the coming year); and a fourth going from $600 at 7 p.m. just before the rule, to $1,000 at 7:30 the first year and $1,400 the second year.

25. Also set forth are earning projections for the future by two unidentified producers with respect to specific but unidentified programs. One is a program which is expected to earn $50,000 a week domestically in about 70 markets (45 of the top 50), or $100,000 per original episode (assuming 26-26). In the second year, if successful, it can be expected to reach 105 markets, $80-90,000 per week, or $160-180,000 per original episode. The figures for the third year, again assuming success, should be 130 markets and $100,000 per week ($200,000 per original). If the original-repeat ratio is less, say 39-13, the income would be a third less per original. A strip program should generate three times these amounts. Distribution costs vary from 15 to 35%, averaging about 25%. Another producer estimated that (on a 26-26 basis), assuming sales the first year in 100 markets including the top 50, the domestic income from a film program would be $67,000 per original, rising to $76,900 the second year and $86,500 the third year. Another program, non-film, would bring in $57,000 the first year, $67,000 the second. A third projection is more general. According to TVB figures, an average half-hour of "spot" time in the top 50 markets is worth $120,000 if it contains 5 commercial minutes, or $72,000 if it contains three, or, assuming a 26-26 new-repeat ratio, $240,000 or $120,000 per original. It is stated that station payment practices now are on the order of the price of one 30-second spot, but they may be expected to rise with time.

26. The comments also make the same point mentioned above concerning greater independent-producer flexibility in use of studio facilities, and the high overhead figures charged to "major" productions, which really distort the actual cost picture by charging to the production various services at inflated prices so as to make a profit on them while building up the "loss" figure. The same is true of distribution costs. One producer is quoted as saying that "the cost depends on how you structure the deal; on whether you are paying the talent a percentage, a fee; how you buy your facilities; how much overhead you're putting into the budget", so that a cost difference of 30% is quite possible, with tape shows costing less.

It is asserted that All in the Family, on tape, started with a price in the $45-65,000 range. The comments also advance the point -- elaborated in the Josephs interview discussed below -- that syndication and network sale and distribution are basically not much different (for network-type "drama" programs), with the first sale in each case generally no more than breaking even or showing a slight loss, the real profit to be realized later from sale for "stripping" and overseas use -- so that independent producers have a real incentive even if their first-run costs of distribution, etc., are relatively high. Attention is called to Viacom's plans early this year to produce its "Addams Family Fun House" series, with cooperative backing by various multiple owner groups and other interested stations; we note, however, that apparently this program project has not come to fruition. The comments also mention barter as a useful financing arrangement stimulating syndication production.

27. A long attachment to the INTV reply comments is a report of an interview with Mr. Ken Josephs, vice president of Metromedia Producers Corp. Much of this concerns the Primus series which Metromedia produced and sold for access-period use during the first rule of the year (but which was not continued), and the Dusty's Trail series which this company is presenting for the coming season. As to Primus, Mr. Josephs stated that its cost was $74,000 per episode, and was sold by five or six people (including himself), in 92 U.S. markets and over 30 foreign countries. Unfortunately, it was not a success, largely because of the late date (spring 1971) at which time the prime time access rule and the "access period" became established. Thus, in order to meet the production schedule no pilot was produced, and certain otherwise avoidable errors were made -- but then this is a very risky business. Mr. Josephs also stressed the point mentioned above, that production for syndication and for networks are basically the same in that the real profit comes relatively late in the game, with quite likely a small loss the first year even for a successful show, and only slight profits the next three years. Another point is that "overhead" may vary tremendously, depending on what a company wants to do, for example, to cover initially as a cost item the cost of studios, executive salaries, etc. Thus, the overhead figure can vary from 10 to 40% -- meaning a program with an actual shooting cost of $70,000 per episode may "cost" $77,000 to $98,000 . For Primus, the budget figure of $74,000 included 10% overhead. The same was said to be true of distribution costs or fees; 35% should represent a handsome profit, and the costs for Primus were between 9 and 10%.

28. Mr. Josephs also mentioned some of the economies possible with syndicated production, for example use of 16 mm film, which the networks resist for regular programs (though they accept it in Cousteau and similar material) but which is good enough under today's conditions, and the point concerning talent, mentioned above. He stated as follows with respect to higher production costs of programs made for networks:

> We have produced for networks, there is no question that when the network has control over a series, and they want you to do and redo certain things, reshoot, that the production can become more expensive than when you are your own master in syndication. Whether or not these decisions to add expenses are going to improve the quality of the show is a subjective judgment.

As to the new Dusty's Trail program, this is budgeted at $75,000 - $80,000 per episode, including about $8,000 overhead (but no amortization of the $190,000 pilot cost); it was stated that this would cost over $100,000 if it were for a network. 7/ It is estimated that the show will gross about $100,000 per episode (domestic and foreign) the first year, which would mean about $20,000 per episode above production costs; but allowing for 9 - 10% out-of-pocket distribution costs, plus advertising prints, etc., the result on that basis would be about a break-even or small loss. (He will be satisfied with $75,000 domestic and $25,000 net foreign). If the show is successful, there will be slight increases in the next three years, but still nothing, at that point, to justify the total investment. But then the company will have 104 episodes, which it can sell as a "strip" vehicle -- for something like $50,000 - 60,000 per negative, or more than $6 million total, representing a profit of $3 million. With respect to material like this, which has a long-range re-run potential (unlike material such as All in the Family), no one expects to make a killing either during the network run, for a network program, or during the first few years of syndication sales for a syndicated program; it is the "strip" potential which is important.

5/ The creative people involved in this program are at least reasonably well established, including the producer of Brady Bunch and Gilligan's Island, and two stars from former successful network series, as well as two featured actresses from "Petticoat Junction". It is stated that their contracts call for one price for network use and a lower one if the program is sold in syndication. The pilot cost of $190,000 included about $145,000 in shooting cost and $45,000 for acquisition of the concept and development money. If the overhead cost were a third instead, or $24,000, the per-episode cost would be shown as $96,000; and if a 35% distribution fee were added, this would be $35,000 of the anticipated $100,000 gross. On these assumptions, the program would show a loss of $31,000 per episode.

29. Mr. Josephs stated that Metromedia sets up its rate card, for this and other programs, to show a substantial profit if every market were sold at the card rate; but this doesn't happen. Markets outside of the top 50 are often entirely off-network re-run users; in the top 50 markets some affiliated stations may be showing a stripped game show or movies so that they are not potential customers, leaving only one potential buyer who will not be willing to pay the card rate. The program is not designed for independent stations, though Metromedia will sell to them rather than let the program go begging in the market (Primus was not sold to any). These stations are more interested in strip material.

30. With respect to its other new access-period show, Elephant Boy, Metromedia acts as U.S. distributor for this program, made in Ceylon by a combination of the German network and Global, a British company, which is part of ITV. Metromedia's fee is higher than 30%. The producing companies can get more money out of European sale than could an American company for an American program; so they regard the U.S. as just one market, not a critical one. Metromedia prices this program lower than "Dusty's Trail".

31. With respect to price received generally, Mr. Josephs emphasized that it varies considerably with the time of day when the program will be used by the station -- early daytime, 4:30 to 6 (Class B or C time, when off-network re-runs prevail) or prime time -- and, of course, varying with the success of the show. As to syndicated access-period programs compared to off-network re-runs, he estimated that, overall, the price for six runs of an off-network show such as "That Girl", used largely in "fringe" time, would be about the same as that for two uses of an access-period program in prime time. Overall, he believed that the potential for access-period first run programming is one and a half times the negative cost, though not necessarily in the first year. In other words, if Dusty's Trail is a hit, it will gross over $100,000 per episode domestically, but probably will only gross about $75,000 the first year.

32. Mr. Josephs was also asked about the international and balance-of-payment situation. On the basis of considerable experience in both domestic and international dealings, he stated that far more money comes to the U.S. through television than goes out, a much more favorable balance of payments situation than for the economy generally.

33. Material in the oral argument. A number of officials of the major film production studios, and two successful producers working usually with the networks (Bud Yorkin and Lee Rich, both members of the National Committee of Independent Television Producers, which opposed the rule), appeared at the oral argument on July 30 and 31, along with Paul Klein, an economic analyst of the industry, all opposing the rule and urging that programing like that on the networks simply cannot be developed in syndication. Those participating on the proponent side include A. Frank Reel of Metromedia Producers Corp., Nick Vanoff, producer of the Hee Haw syndicated program, and other NAITP members and that organization's counsel. In general, the facts and arguments were the same as or similar to those mentioned above.

34. As to costs, the opponents emphasized the high cost of creating network programs; for example, Mr. Yorkin stated that the cost of writing alone for All in the Family was $12,500 per program (more than the entire cost of producing a game show), with the Writers Guild minimum being $4,100 per week after two scripts, and few shows being able to make do with one writer. It was said that syndication could not possibly support The Waltons, with its cast of 11, or a program such as Pomeroy's People, of significance to Black groups, which the networks would have presented were it not for the restriction of the rule. A 20th Century Fox official stated that while that company has been active and reasonably successful in production for first-run syndication under the rule, it has always required two conditions: (1) a deal with a network owned-station group; and (2) lower-cost foreign production (Circus, Family Classics, Starlost). With respect to the Dr. Kildare program, the statement by an MGM official (who was not actually at the argument) was to the effect that because of its more limited economic base this program was not as good as the earlier network program of the same name, or current network programs, but had to use old scripts and lesser-known actors and otherwise skimp on production values (another participant said that the average income for the series was between $50,000 and $55,000 per episode, which did not cover direct costs). 6/ An MCA official, Mr. Friedland, stated that any cut in costs -- for example, as between $100,000 and $75,000 per episode -- will come from "above the line" costs for talent, writers, directors, etc., and not "below the line" (technicians, facilities, etc.); and that while there is not a one-one relationship between cost and quality, the two do go together; you have to pay more for the best talent and other people. Mr. Friedland said that he and MCA had not been able to make an acceptable syndicated series for $30,000 per episode plus free use of facilities, crews, and performers worth $50,000 per episode.

6/ The Kildare program was described as having audience ratings "among the best", but this was not true in all markets(e.g. Washington,D.C.).

35. On the other side, it was stated by counsel for NAITP that a firts-run syndicated show can be produced for 30% less than a similar network show; Nick Vanoff stated on the basis of his experience that the Hee Haw talent work for less now than they did when the show was on CBS, and Mr. Reel's statement was the same as to Dusty's Trail (Hee Haw has 36 performers and 11 musicians, and is said to give employment altogether to 150 persons). Other savings mentioned by Messrs. Vanoff and Reel included the independent producer's being able to shop around for economical facilities rather than having to use those of the networks or the "majors", and being able to use 16 mm rather than 35 mm film (the networks require the latter in regular series, although they will take 16mm "outdoor" material such as National Geographic). According to Mr. Reel, Dusty's Trail costs about $80,000 per episode, and the earlier Metromedia Primus program cost about $75,000, both grossing in revenue about $62,000 domestic and $20,000 foreign.

36. As to potential revenues, Mr. Klein, the economic analyst testifying for the opponents, estimated that maximum first-run syndicated revenue from U.S. sales is about $58,000 gross per episode ($35,000 first-run, $23,000 repeat). This was figured on average audience of about 7,700,000 homes for such prime-time material, station 30-second spot rates based on $1.50 per thousand homes, station willingness to pay roughly the price of 3 30-second spots for a program episode. From this would have to come the considerable costs of sales and distribution in syndication, multiple prints, etc., which would cut the net figure to about $45,000. Using the same type of formula (assuming average network audience of 12,500,000 homes, average network charge to advertisers of $2 per thousand), Mr. Klein figured a first-run network per-episode income of $150,000 gross, which would be reduced by advertising commissions and station compensation to $96,000; the second-run income would be $67,000, for a total of $163,000. Mr. Friedland stated that in the heyday of syndication 15 to 20 years ago, $40,000 was about the top income that could be expected, and it was now only about $45,000, and one would be lucky to get that -- $30,000 from an owned station group, and $15,000 from the rest of the country.

37. Mr. Reel, on behalf of Metromedia, went through a somewhat similar analysis to that of Mr. Klein, and came up with $144,000 income per half hour, assuming $3 per thousand for one minute as the general basis of station rates, 12 million homes, and 4 minutes per half-hour. It was stated by another participant in the argument that Let's Make a Deal, one of the successful game shows, grosses $80,000 per episode, which is a great deal more than it takes to produce this program, the money thus earned has helped to support production of the new It Pays to be Ignorant comedy series.

SEPARATE STATEMENT BY CHAIRMAN DEAN BURCH

(in the Prime Time Access Proceeding)

For the reasons I stated at length in 23 FCC 2d 411 (1970) and 25 FCC 2d 337 (1970), I believe the prime time access rule should be repealed. It has failed to achieve any of its objectives, whether explicit, implicit, or subliminal.

Because today's action might have been worse, I concur in it -- but with one proviso: Any notion that the rule, with or without the modifications adopted here, represent a serious attempt to come to grips with network dominance of the television programming market is a myth. How much better it would have been had the Commission expended a comparable amount of its resources and talents on sober study and rational action dealing directly with the fundamental problem.

That <u>was</u> the Commission's responsibility in 1970. It still is.

DISSENTING STATEMENT OF CHAIRMAN DEAN BURCH IN WHICH COMMISSIONER WELLS CONCURS

The majority of the Commission has today acted on a proceeding that began with a notice in 1965, but whose origin really goes back over a decade. The thrust of my dissent is directed to the so-called prime time access rule (Formerly Westinghouse plan, formerly modified 50–50 plan).

The basis of this rule is that as of today, as evidenced by the data in the report and order, the three network organizations, ABC, NBC, and CBS, supply either through their own production efforts or through joint ventures with independent producers approximately 56.7 percent of the network programing which dominates the prime time viewing[1] hours. At the present time networks during the 7–11 p.m. (e.s.t.) time period feed 3½ hours of network programing, with 30 minutes being left for the stations themselves to supply out of their own resources. The rule would require that during this period (of 7–11 p.m. (e.s.t.)) the affiliates carry no more than 3 hours of programing, the net result being an additional 30 minutes per night of time which must be supplied by the local station, either from locally developed programing or from syndicated materials which they can purchase through the syndication market. One other proviso of the rule (which I will comment upon hereafter) is that during the 1-hour period from which network programing is to be excluded, the affiliated stations may not use an off-network syndication series or feature film previously broadcast in the market.

[1] Thus, network affiliates in 1968 carried an average of between 3.3 and 4.7 (depending upon size of market) hours a week of nonnetwork programing between the hours of 7–11 p.m. out of the total of 28 hours; between the hours of 7:30–10:30 p.m. the figure is from 1.2 to 1.6 hours.

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The rationale for this rule goes somewhat as follows: The networks compete vigorously; however, they tend to parallel each other in programing. There is no healthy syndication market in this country because the sine qua non of syndication is access to prime time in the top 50 markets. Ergo, by making prime time available in the top 50 markets, a healthy syndication market will emerge, the competitive system will have been stimulated, and—presumably—the public will benefit.

I want to make it clear that I do not quarrel with the motives of the majority in this rulemaking, to the extent that they are hopeful—although, as I will show, Pollyannish—that this rule will in fact stimulate a healthy independent syndication market, and the public will be substantially enriched by new programing fare. I believe that an unstated premise of the rule adopted today, and one which I think must be faced, is that if a majority of the Commission were satisfied with the present network product, this rule would be deemed unnecessary. I thus believe that, despite protestations to the contrary, the rule is basically a reflection of the Commission's judgment that programming today does not satisfy its standards of diversity. Another parallel unstated premise is the assumption that because of economic motives the networks are purposefully depriving the public of the programing to which it is entitled.

Before proceeding to a discussion of the rule itself, it is necessary to say a word about the pattern of network programing today: namely, that the networks themselves produce or coproduce some 97 percent of the programing. Thus, as to the three networks combined, network participation in all evening (6–11 p.m.) programs rose from 38.5 percent in 1957 to 80.4 percent in 1968, a figure which, when added to the number of network produced shows, reveals a rise from 67.2 to 96.7 percent. Stated differently, independently provided shows decreased from 32.8 percent in 1957 to 3.3 percent in 1968. Similar figures reflect the trend when only entertainment shows are looked to (see par. 12, report and order).

There are a number of reasons for this development, but the prime one is simply economics. Programing is expensive; advertisers have insisted during the past few years on availability of 30-second commercials and have not been interested in sponsoring complete shows. Whether this is good or bad, it is a fact.

The costs of network quality programs have risen enormously. In 1957 a 30-minute network show could be produced for approximately $15,000; in 1968, its cost was $87,000 per half hour, whereas today the information available to the Commission indicates that a 30-minute network quality color show will cost the producer from $100,000 to $150,000.

Quite obviously, the foregoing facts pose a serious problem to entrepreneurs who seek to provide quality shows to stations. The networks can meet these problems because, by the very nature of networking, they can and do deliver, even without option time, the great majority of their affiliates during prime time on an established economically feasible interconnected basis, and are uniquely able to sell spots to national advertisers in the manner now desired by such advertisers.

[redacted]
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Again, let me say that I am not necessarily defending the system, but I think that we must face reality rather than what we might hope and these are the facts today.

With this as background, I turn to what I believe is a fatal flaw in the reasoning of the majority. That reasoning is that, given access to prime time in top markets, syndicators will immediately produce quality programing which will be made available to the stations because it will be profitable to the syndicator and to the station. The real problem with the rule is that this premise has not been demonstrated to be true, and, in fact, the evidence before the Commission presently indicates that it is indeed faulty. Why? Simply because the syndicator, even though assured of a shot at the prime time of affiliates in the top 50 markets, can certainly not be assured that his program is going to be selected by a sufficient number of stations in such markets. Even if the program is selected under existing economics and tax structures, it is quite clear that very great amounts of capital will be required to produce programing, with much of this capital having to be amortized for a long period of time. The fractionated top 50 market is simply not sufficient to sustain the expensive programing effort here required. In short, today in the programing field, money is the name of the game, and unfortunately, the Commission, despite its plenary power to regulate, cannot so easily regulate the laws of economics.

Thus, taking the majority's action at face value, I believe that it is an economic mistake—that it will not produce the result sought, a healthy television film producing market.

Let me turn briefly to another aspect—whether it will result in diversity of programing. Assuming that the rule does have substantial or some efficacy, I strongly believe that there will be little, if any, contribution to real diversity of programing. What will be produced under the aegis of this rule will simply be more of the same—more games, more light entertainment along proven formulas, more "emcee" talk shows. Both the producer and the affiliate will inevitably drift very largely to the sure thing—the tried and true—because of the economics of the system under the rule; indeed, those economics may well dictate programing produced with reduced resources. Time will of course supply the definitive answer here, but unfortunately for the viewing public, I feel confident that my assessment will prove correct.

It may be argued that so what? Why not try this approach, and if it does not work, return to the drawing board. But there is an old medical adage, "First, above all, do no harm to the patient." The Commission today violates that prescription in several important ways.

First, the public in the top 50 markets will be deprived of significant amounts of popular high quality network fare in the prime viewing hours, and in my judgment of the economics, that fare will not be replaced by the equivalent high quality, first-run syndicated programing visualized by the majority. Second, in the smaller markets, it is also clear that there will be a similar deprivation, and indeed, one which will have a much larger adverse impact upon the stations and consequently the viewing public in those markets. The rule purports to exempt the markets below the top 50. In practical effect, there is no such exemption. Here again the economics give the answer; to produce

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and distribute very costly programs for markets which represent only a small percentage of the population is simply not feasible. The networks have indicated that they will not continue to feed 3½ hours of programing just for the below 50 markets, and while the Commission may talk of ordering the waves to roll back, it is just not practical.

This has much more serious consequences for these markets. There is simply not the same advertising base for relatively high cost programing in these markets. The stations may therefore be unable to maintain such programing, even assuming arguendo that it would be supplied by nonnetwork sources.

Third, the rule purports to benefit the new UHF independents coming on the air. But here again the practicalities undermine the theory. Because of the rule, the VHF stations will be seeking more nonnetwork programing, and are in a position to outbid the struggling new UHF, which depends almost entirely on such programing. Because of this consideration, the association of UHF broadcasters (ACTS) recently and in strong terms counseled that the rule will hurt, not help, UHF.

Finally, there is the consideration of the effect on enhanced dissemination of news programing. The originally proposed rule (so-called 50-50) would have exempted newscasts, news interviews, etc., and specifically requested comment on whether news documentaries should be exempted. I fully agree with the exemption in the rule adopted for on-the-spot coverage of news events, and political broadcasts. I disagree, however, with the majority's failure to exempt news interviews and most importantly, the news documentary and the newscast which are, after all, the chief means of informing the public on events and issues. When the question of exemption for the present rule came before the Commission, the majority, aware that the networks could avoid the impact of the rule by extending the 30-minute evening news show into a 1-hour news show, determined not to exempt the newscast. In my opinion, if this rule had resulted in additional prime time news programing—the thing which network television can and does do best—that would have been a benefit to the entire country. Because of its stated concern over the syndication market, the majority forecloses this possibility. The majority also forecloses the possibility of an enhanced number of news documentaries, and indeed may be inducing a cutback in such programing. I strongly believe that the Commission cannot properly adopt a policy of subordinating news programing, which informs the public and is surely not in oversupply, to entertainment programing, which exists in far greater amounts and seeks but to amuse. So on this ground also, I believe that the rule is seriously defective; however, even if remedied in this respect, the rule would still be undesirable, for the other reasons developed.

There is a procedural matter which also concerns me greatly. Immediately prior to the final adoption of the rule in the open rule-making proceeding, the Commission, through telegrams, letters, and other presentations, learned that the west coast syndication market itself, the very people who are supposed to be helped by this rule, were greatly concerned that in fact they would be harmed because

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their major source of income—the networks—would cut back on programing. This point of view was reinforced by a great number of the California labor organizations as well as knowledgeable people from all parts of the industry. These very interested persons requested the Commission to adopt a tentative rule, which would be subject to comment by all interested parties and then, on such a full record, adopt the rule in final form, with such revisions as are appropriate. This procedure, which the Commission recently followed in the computer proceeding (docket No. 16979), seemed to me to be most reasonable, and I therefore moved its adoption. This was denied on the ground that the matter has been kicking around for 5 years, had been subject to full opportunity for comment, and should now be acted upon. I am in sympathy with the idea that we should not take 5 years to do anything, but nevertheless, in the face of mounting evidence that the rule, rather than being beneficial, might actually be harmful, the better part of administrative valor would surely have been to go along with the suggested procedure. I repeat that the first requisite of Commission action is not that it act, but that it act with reasonable assurance of promoting the public interest.

Further, I do not believe that there has been such full opportunity to develop a record on the rule adopted by the Commission. Take, for example, an important part of the rule, the proscription in subsection (3) of 73.658(k) of off-network program series and feature films previously broadcast in the market, in the time period from which network programing is barred. This was not proposed by the Commission, and there has been no record developed on this important aspect. Thus, the Commission today has no data whatsoever as to the economic impact of this particular provision, both on the efficacy of the rule and upon the contractual arrangements of the stations. To what extent, for example, have these affiliated stations purchased series or feature films, with the express purpose (and payment therefor) of presenting them in prime time? What is the effect on the syndicators and the film producers—the persons sought to be helped by this rule? Granted, these are all economic concerns, but, as I have stated before, economics is really what this rule is all about, and the Commission should at least have had up-to-date information in this field before acting.

The Commission does state in paragraph 38 of the Report and Order that it will consider some of these matters on a motion for reconsideration. This is contrary to good administrative procedure, and indeed to commonsense. If there is a substantial question as to the efficacy of the rule, that question should be reached prior to adoption of the rule, not after. Otherwise, the matter smacks of sentence first, judgment later. This Commission has only so many regulatory arrows in the quiver and when it takes a major step such as this rule, it should be taken with full knowledge of all the pertinent facts and after consideration of all the potential benefits and harms that might flow from the rule.

Having set forth my objections to the procedure and substance of the rule, I want to address one last aspect of this rule and indeed of regulatory philosophy in general. The proponents of this rule will argue there is a problem and the Commission has acted to meet that

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problem. In other words, rather than cursing the darkness, they have lit a candle. My answer to that is simply, "Yes, there were and are a number of candles available but in my opinion, this is not one, but rather a sky rocket—flashy, momentarily pleasing, but with no substance." Since we are dealing with economics, if the Commission really wishes to make available to the public diverse programing, it must encourage a different economic base for program presentation. Quite obviously, so long as a broadcaster has only one channel on which to operate, his economic requirements will tend to make him program that one channel for a mass audience. Accordingly, minority needs or tastes will be denied or underserved. This means, in turn, rather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus may make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.

First, there is subscription television, which has a different economic base and can present programing that is not necessarily designed for a mass audience and still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programing.

There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.

Nevertheless, the Commission has moved ahead with this rule—in my opinion simply because it was there. Although it is difficult in this day and age to make specific forecasts as to what will happen, I predict—unhappily—that if this rule is adopted in its present form, after the passage of a few years, there will be no genuine benefit to the independent film industry at least sufficient to offset the detriments to the broadcaster and most importantly to the viewing public. The rule may shift some dollars from one pocket to another and maybe this is good. It may very well harm the networks to some extent, great or large, and in some people's minds, this seems to be worthwhile. In conclusion, while respecting the motives and objectives of the majority in this case, I simply feel that they have wasted the resources and energies of this Commission in a futile effort to administratively tamper with the economics of programing as it exists rather than attempting to create a situation where the economics could make sense.

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur fully in the action here, though there are some respects in which I would have liked to do things differently. I would like to add some individual comments, primarily addressed to Chairman Burch's dissenting statement.

I share some of his concerns. Like many actions the Commission takes, the resolution of this matter is not guaranteed to produce the results we seek. However, based on the record in this long proceeding and on study of this problem for over 14 years, I think this is the most logical and effective step we can take to correct a serious problem.

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DISSENTING STATEMENT OF CHAIRMAN BURCH

On May 4, 1970, the Commission refused to reconsider its adoption of the so-called "Prime Time Access Rule." I dissented to the initial action [24] and now dissent to the refusal to grant reconsideration. I am more convinced than ever from reading the recent pleadings in this case that the concerns I expressed in my prior dissent are justified.

I had expressed grave reservations about the rule being adopted before there had been a full opportunity to develop the necessary data upon which any intelligent decision could be made. I have set forth in some detail my view that the rule simply goes against the economics of program production and distribution, and will therefore fail of its purpose. I have also set forth that this will not be a "noble failure"—that on the contrary, the rule will have serious adverse consequences to the public interest. I will not repeat that discussion, and indeed, would ordinarily not issue a further dissenting statement. But there is one particular aspect as to which further information is now available and which does therefore call for further comment. I refer to the adverse effect of the Rule on affiliated stations in the markets below the top 50.

Apparently my worst fears are borne out by the additional data we received in support of reconsideration. Our staff has concluded there will be substantial adverse effects on many affiliates in smaller markets

[24] See Dissenting Statement of Chairman Burch, FCC 70-466, 23 F.C.C. 2d 411 (1970).

and that between 30 and 40 small stations (many of which are UHF) would suffer declines in revenue of between $25–30,000 each as a result of the rule. This is a significant amount considering their total revenue and income. It is also speculated that the cutbacks necessitated by this drop in revenue will come in the area of news and public affairs programming.

Although the majority is not moved by the reduction in service and financial loss facing these stations, I am. The majority considers such consequences to be outweighed by the "public interest benefit" that *might* obtain from the rule. The touchstone of Commission action is of course the public interest. The Commission has long and consistently held that the public interest is served by promoting strong local service, including in the smaller markets, and by fostering the development of UHF stations. The majority now knows *definitely* that its action is against the public interest in these important respects. Since that is so, there is all the more need for a strong, compelling showing of benefits which would outweigh these most serious drawbacks. There is no such showing here, and indeed, as I have made clear, the contrary is indicated. In short, as I pointed out in my earlier dissent, adverse impact is a calculated risk that is only worth taking when the advantages to be gained are real and substantial—not ephemeral and unlikely.

I'm sure that the citizens in the small communities affected will be heartened to hear that while the action we have affirmed today will have adverse impact on the stations they view, our expertise shows that even with the adversity we have heaped upon their already marginal operations, they probably will be able to stay in business. I'm sure this also is small solace to the stations.

I thus believe the potential financial damage to this many stations far outweighs the tenuous hope of bolstering the independent syndication markets to which the majority clings in denying reconsideration.

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SEPARATE CONCURRING STATEMENT OF
COMMISSIONER CHARLOTTE T. REID

PRIME TIME ACCESS RULE

Today the Commission adds yet another chapter of verse to the continuing saga of the "Prime Time Access" Rule.

Since my appointment to this Commission over two years ago, I have heard innumerable complaints from the viewing audience as well as many others about this rule. Based upon the evidence before us, I believe that the total repeal of the rule would have been much more in the public interest. However, I fully appreciate the fact that one must accept realities as they occur.

During the course of our many discussions on this matter it became quite apparent that there was not going to be a majority of votes for repeal of the rule at this time. Since the compromise evidenced by this document seemed to be the closest to total repeal that could be obtained, I decided to concur in its adoption. I want to be absolutely certain however that proper notice is given, here and now, to those who have supported the prime time access rule in the past that unless something better is given to the viewing public than that which has been given in the past few years, then I firmly believe that the public interest would best be served by a complete repeal of the rule.

CONCURRING STATEMENT OF
COMMISSIONER RICHARD E. WILEY

In re

Consideration of the operation of, and possible changes in, the "prime time access rule," Section 73.658(k) of the Commission's Rules. Docket No. 19622.

I have concurred in the adoption of this Report and Order because retention of the rule, as amended, holds out at least some promise of achieving a measure of diversity in sources of program production, because it represents our best effort to bring some order out of a panoply of waiver requests and associated administrative problems and -- quite frankly -- because it was capable of achieving some consensus within the Commission, however fragile.

A consensus is something which, in its four corners, does not satisfy all parties to the fullest. And so it is with me in a number of particulars. However, in this statement, I would like to focus on only one area of reservation -- that relating to paragraph 88 of the Report.

My concern is that, in our zeal to encourage the development of programming which we believe to be responsive to public needs, we may have been somewhat improvident in setting forth our expectations as to the use of "cleared" 7:30 time periods for "locally significant material".

Initially, let me say that I recognize that the Commission has a legitimate responsibility to help determine the composition of broadcast "traffic". National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943). For example, we long ago called attention to the continuing obligation of broadcast licensees to keep their community informed in the area of news, public affairs and related programming. Report on Editorializing, 13 F.C.C. 1246, 1249 (1949). Moreover, I lend my complete endorsement to the suggestion that all licensees should redouble their efforts to seek out and meet the requirements of all viewers. And, indeed, I personally applaud special programming efforts by broadcasters responsive to the needs and interests of children, minorities and, as ascertained, the local community. See our Network Programming Inquiry, F.R. 60-7198, FCC 60-970, where we listed the major programming elements "usually" necessary to meet the public interest.

Perhaps, then, it is only a subtle distinction between our recognition of the public interest value of such programming, and our exhortation to licensees that we expect an "appropriate portion" of "cleared time" (or at least of total prime-time) to be devoted to the particular needs of children, minority groups and the community. Nevertheless, I must confess to some trepidation that our "expectation" will be read to mean a demand, and that our "raised eye-brow" is synonymous with a decree for specific program types and amounts. The difficulty, of course, is not that the programming needs of children, for example, should go unrecognized by this Commission. On the contrary, the public interest means nothing if it permits licensees to ignore significant groups within their community. I question, however, whether this agency can hereafter avoid further particularization of other rather specific program needs which it believes should be singled out for special treatment during particular portions of the broadcast day. Perhaps it is less than completely satisfactory to rely on licensee ascertainment and programming discretion; yet I fear that the alternative of governmentally suggested program material to be carried in particular time segments may prove to be an unwise substitute. Accordingly, while our objective in paragraph 88 is well intentioned, and while I have no personal quarrel with the enumerated categories, I believe it to be prudent to at least set forth my reservations.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 74-221
10446

In the Matter of

Consideration of the	)	Docket No: 19622
operation of, and	)	
possible changes in,	)	RM-1967
the "prime time access	)	RM-1935
rule", §73.658(k) of	)	RM-1940
the Commission's Rules	)	RM-1929

MEMORANDUM OPINION AND ORDER
DENYING STAY

Adopted: February 27, 1974; Released: March 6, 1974

By the Commission: Commissioners Robert E. Lee, Reid, Wiley and Hooks concurring in the result.

1. The Commission here considers a "Petition for Stay" filed on February 11, 1974, by the National Association of Independent Television Producers and Distributors (NAITPD), directed at our decision in this proceeding adopting modifications of the prime time access rule (§73.658(k) of our Rules) to be effective in September 1974. 1/ NAITPD, which has sought judicial review of our decision in the U.S. Court of Appeals (C.A.2), asks that the effective date of the changes be September 1975, a stay of one year, inter alia because of the uncertainty which will prevail pending disposition of its appeal. This would leave the present rule in effect until that time. By Public Notice of February 14, 1974 (FCC 74-173) the Commission gave notice of the filing of this petition, and, pursuant to §1.45 of the Rules, stated that oppositions and other material relating to the petition might be filed until February 21, 1974.

1/ FCC 74-80, released February 6, 1974, published at 39 F.R. 5585 (February 14, 1974). The effective date of the changes was specified as whatever date in September 1974 the station's network designates as the start of its new season.

The decision made several changes in the rule; those of particular significance to NAITPD appear to be the removal of all restrictions on Sunday and on the first half-hour of prime time on other days (7-7:30 E.T. and P.T., 6-6:30 C.T. and M.T.), and the provision that one of the six "cleared" half-hours (Monday-Saturday 7:30-8 E.T.) may be filled with network or off-network material which is children's specials, documentary or public-affairs material. Reference is also made to one part of the decision not set forth in the rule, which states the Commission's expectation that an appropriate portion of the cleared periods, or at least of total prime time, will be devoted to locally significant material of certain types.

2. The NAITPD petition drew six formal supporting statements, from the Association of Independent Television Stations, Inc. (INTV), Westinghouse Broadcasting Company, Inc. (Westinghouse), Viacom International, Inc. (Viacom), Time-Life Films, Sandy Frank Program Sales,Inc. (Frank), and Rust Craft Broadcasting of New York, Inc. (WROC-TV, Rochester, N.Y.). NAITPD also filed "Supplementary Information" in support of its petition. There were also supporting letters or telegrams from Filmways, Inc. (producer of the syndicated Ozzie's Girls program), Don Fedderson Productions, Inc. (distributor of the Lawrence Welk program),Lawrence Welk, Yongestreet Program Services, Inc. (producer of the Hee Haw show), Metromedia Producers Corporation (particularly concerning a new one-hour program it is marketing for this coming year), Jim Victory Television,Inc. (distributor of the Concentration program) and two program processing companies (Glen Glenn Sound and Consolidated Film Industries). Four formal oppositions were filed, by Columbia Broadcasting System,Inc. (CBS) and three major film producers -- MCA,Inc., Warner Brothers,Inc., and Screen Gems Division of Columbia Pictures, Inc. Opposing telegrams were also received from Chester L. Midgen, Executive Secretary of the Screen Actors Guild, and from some 13 program producers, most of them members of the National Committee of Independent Television Producers, a group opposed to the prime time access rule which has urged its repeal. 2/ These include Lee Rich (Lorimar Productions) and Gene Roddenberry (chairman and co-chairman of the group), Bud Yorkin (Tandem Productions, Inc.), Jack Webb (Mark VII Ltd.), Duke Vincent (Vincent Productions), Quinn Martin (QM Productions), Jack P. Foreman (Samuel Goldwyn Studio), Jackie Cooper (Jackie Cooper Productions), Bruce Johnson (Bruce Johnson Productions), Grant A. Tinker (MTM Enterprises,Inc.), Bill Persky and Sam Denoff (Concept II), George Schlatter (George Schlatter Productions), and Bob Banner. American Broadcasting Companies,Inc. (ABC) filed a statement stating that it does not oppose the stay; National Broadcasting Company, Inc. (NBC) did not file any material on this subject.

3. Upon consideration of the foregoing we are of the view that this Petition for Stay filed by NAITPD should be denied. In the material presented to the Commission on this question, there is nothing that convinces us that our previous determination as to the date of effectiveness of the modifications adopted in this proceeding should be abandoned. The matter of the appropriate effective date of the changes -- designed to give enough "lead time" for an orderly transition and yet implement reasonably early the changes found to be in the public interest -- was considered and discussed at length in the Report and Order herein (FCC 74-80, pars. 113-116), in connection with a similar petition filed by NAITPD; and we find in the material before us now no reason to change this decision.

2/ The text of all but two of these telegrams from NCITP producers was identical.

4. One of the threshold criteria for granting a stay in connection with an appeal is a showing that petitioner is likely to prevail on the merits. NAITP's argument concerning this matter is brief and general. We find that its showing in this basic respect is clearly insufficient, and therefore grant of a stay would be inappropriate. It is unnecessary to discuss at length the other matters urged. As to the irreparable injury claimed, to independent program producers and syndicators, this appears speculative in view of: (1) the substantial amount of "cleared" time remaining under the revised rule (the reduction is in fact less than that asserted by NAIPTD) 3/; (2) the established position of some of the programs particularly mentioned (such as Hee Haw and Lawrence Welk) so that reduction in "cleared" time need not necessarily mean non-clearance by stations; (3) the uncertainty as to whether the networks (particularly ABC and CBS) will use additional time the first year other than on Sundays; and (4) the opportunities for clearance at other times (e.g., Hee Haw in Washington, D.C., carried in the "network" portion of prime time) or (in the larger markets) on independent stations not covered by the rule (each of the two programs mentioned is carried on independent stations in the top three and two or three more of the top 10 markets).

3/ NAITPD et al claim that the reduction is from 42 to 12 half-hours a week. As pointed out at some length in our decision, with respect to 90% of the stations covered by the rule, 15 half-hours per week per market (Monday-Friday 7-7:30 p.m. E.T. etc.) are used for programming which existed before the rule in this time period (local or network news and stripped game shows) and thus does not appear to need the rule's economic support. This reduces the "base" to 27. The figure of 12 half-hours under the new rule assumes the maximum possible reductions for regular network programs on Sundays, "special" network programs on one other night, and a half-hour of "cleared" time (rather than other prime time) for "locally significant" material. A figure of 14-16 remaining "cleared" periods per market appears more nearly realistic.

5. Moreover, much of the impact claimed to result from a contraction in the amount of "cleared" access time is something which will happen at whatever time the new rule goes into effect, and thus is not reason to make it 1975 instead of 1974. It is also to be noted that these and other parties have long been on notice, since the fall of 1972, that the Commission was considering changes in the rule, or repeal of it, going considerably beyond the reduction in cleared time finally adopted. In sum, as mentioned in our decision, the rule in its present form operates as a restraint which is not fully justified, and it is appropriate to act at a reasonably early date to lessen the restraint, in the public interest.

6. Accordingly, IT IS ORDERED, That the Petition for Stay filed by the National Association of Independent Television Producers and Distributors (NAITPD) on February 11, 1974, requesting a one-year stay in effectiveness of the modifications of the prime time access rule (§73.658(k) of the Commission's Rules) adopted in this proceeding, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS,	)	
Petitioner,	)	
v.	)	Case No. 74-1168
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	
Respondents,	)	
COLUMBIA BROADCASTING SYSTEM, INC., et. al.	)	
Intervenors.	)	
WESTINGHOUSE BROADCASTING COMPANY, INC.,	)	
Petitioner,	)	
v.	)	Case No. 74-1283
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,	)	
Respondents,	)	
COLUMBIA BROADCASTING SYSTEM, INC., et. al.	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

The undersigned do hereby certify that copies of the Joint Appendix in the above-captioned appeals were (except as noted below) served by United States Mail, first class, postage prepaid, on March 21, 1974, upon the following:

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